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A

TREATISE

ON THE

LAW OF EVIDENCE.

FIFTH AMERICAN, FROM THE SEVENTH AND EIGHTH LONDON EDITIONS.

BY S. MARCH PHILLIPPS, ESQ.

BARRISTER AT LAW.

IN TWO VOLUMES.

WITH NOTES TO THE FIRST VOLUME.

BY ESEK COWEN,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE STATE OF NEW-YORK;

ASSISTED

BY NICHOLAS HILL, JR.

COUNSELLOR AT LAW.

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TO

THE SEVENTH EDITION.

The last Edition of the Treatise on Evidence having been long out of print, a Seventh is now submitted to the Profession and to the Public, carefully revised, and very materially enlarged.

In preparing the present Edition, I have been fortunate in obtaining the valuable assistance of my friend, Mr. Amos. On quitting the practice of the bar, for other occupations of a different kind, I found it would no longer be in my power to give that unremitting attention to professional studies, without which I could not hope to carry on such a work with any prospect of success. I was, therefore, glad to avail myself of the aid of a friend, whose talents and professional knowledge are well known and highly appreciated.

Of this Edition, I have revised the whole of the First Volume, inserting the cases recently decided, and making many alterations which appeared to be improvements. The section in the Second Volume, which treats of Actions against Commissioners of Sewers, is mine: and, I believe, it is the first which has been written on that subject.

The other additions to the Second Volume have been made entirely by my coadjutor. All the important chapters are much enlarged. Many parts are entirely new: among which may be mentioned, the chapter on actions by Commissioners of Bankrupts; several heads in the chapter on Policies of Insurance; and the articles on Carriers, on the Special Pleas in Assumpsit and Actions of Trespass, on the Pleas in Abatement, on the Plea of Tender, and the Plea of the Statute of Limitations. The chapters on Bills of Exchange, on the Statute of Frauds, and the section on the Action of Trespass against the Person, have been recast, and now appear in a more convenient and better form. The new notes which have been introduced in the Second Volume, are the result of extensive research, and will be found of great value.(*a*)

Whitehall, *January* 8, 1829.

(*a*) For the preface by the American Editors of the first volume, and a list of the books consulted by them, see the first volume of the Notes.

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A

TREATISE

ON THE

LAW OF EVIDENCE.

BOOK THE FIRST.

Plan of the work.

THE arrangement, which has been adopted in the following treatise, is that which appeared the most simple and perspicuous. In the first volume, the subject of evidence is considered chiefly with reference to its general nature, and the general principles on which it is admitted in our courts of justice. This volume consists of two parts: the one relating principally to parol or unwritten evidence, the other to written evidence. The second volume treats of evidence more in detail, with reference to particular kinds of action and forms of pleading.

The first question which occurs, in entering on the subject of evidence, relates to the method of enforcing the attendance of witnesses at the trial of a cause. This is treated of in the first chapter.

If a witness attends, and is ready to give evidence, the question next in order is, whether his testimony can be admitted, or whether there is any objection to his competence? Objections to the competency of witnesses are of four kinds. The first ground of incompetence is want of reason or understanding: a second ground is defect of religious principle: a third ground arises from conviction of certain crimes: the fourth and most common cause of incompetency is interest.

These several grounds of objection are the subjects of the second, third, fourth, and fifth chapters.

Besides the objections above mentioned, there is one other, of a more partial and limited kind, which is founded on the professional relation between attorney and client. The extent and privilege of this professional confidence are considered in the sixth chapter.

After ascertaining whether a witness is competent to give evidence, the next question will be, what evidence ought to be given, and how the witness ought to be examined? The seventh chapter, therefore, treats of the principal general rules of evidence, and of the general nature of proofs; and the eighth treats of the regular mode of examination. The first part of the present volume concludes with an inquiry into bills of exception and demurrers to evidence.

The second part, which relates to written evidence, treats of records, of the admissibility of verdicts, judgments, and other judicial proceedings, and of the manner in which they are to be regularly proved. Public writings, not of a judicial nature, and the inspection of such writings, are next considered; after which follows an inquiry into the proof of private writings, the requisite of stamps on written instruments, and, lastly, into the admissibility of parol evidence, by which written instruments may be explained or varied.

PART THE FIRST.

CHAPTER I.

Of the Attendance of Witnesses.

Subpœna.

THE process which our courts of law have instituted for the purpose of compelling the attendance of witnesses, is the writ of subpœna *ad testificandum.* (*a*) This writ commands the witness to

(*a*) See Note 1, p. 1.

appear at the trial, to testify what he knows in the cause, under the penalty of 10*l.* to be forfeited to the king.(1) (*a*) And the stat. 5 Eliz. c. 9, s. 12, (which refers to the process of courts of record, for the attendance of witnesses, as process well known and then in use, (2) gives an additional remedy, by enacting, that "if any person (upon whom any process out of a court of record shall be served, to testify concerning any cause or matter depending there, and having tendered to him, according to his countenance or calling, such reasonable sum of money for his costs and charges,(*b*) as, with regard to the distance of the place, is necessary to be allowed) do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary, he shall forfeit for every such offence 10*l.*, and yield such further recompense to the party grieved, as, by the discretion of the judge of the court out of which the process issues, shall be awarded."(*c*) 5 Eliz. c. 9.

If a witness has in his possession any deeds or writings, which are required at the trial, a special clause must be inserted in the subpœna, called a *duces tecum*,(*d*) commanding him to bring them with him. When the writings are in possession of the adverse party or his attorney, notice should be given to produce them,(*e*) and if, after proof of a reasonable notice, they are refused, secondary evidence of the contents will be admitted. It will not be necessary to give notice to the defendant in person; giving it to his attorney will be sufficient even in penal actions.(3) (*f*) This writ of subpœna *duces tecum*, as well as the other writ of subpœna *ad testificandum*, is compulsory upon the witness. And though it will be a question for the consideration of the judge at the trial, whether in any particular case the actual production of writings should be enforced, yet the witness ought always to have them ready to be produced, if required, in obedience to the judicial mandate.(4) From the earliest times, our courts of law, in order to give effect to their proceedings, have resorted Subpœna duces tecum. Notice

(1) See form of this writ, on a trial, in Tidd. App. p. 331; and on a writ of inquiry, p. 241.
(2) See 9 East, 484.
(3) Attorney General v. Le Merchant, 2 T. R. 203. n. Cates q. t. v. Winter, 3 T. R. 306. See form of writ, Tidd. App. 332. And see further as to such notice, *infra*, Chap. 8. Sec. 1.
(4) Amey v. Long, 9 East, 485. Field v. Beaumont, 1 Swanst. 209.

(*a*) See Note 2, p. 1. (*b*) See Note 3, p. 7. (*c*) See Note 4, p. 11. (*d*) See Note 5, p. 11. (*e*) See Note 6, p. 12. (*f*) See Note 7, p. 13.

to these compulsory measures for the production of evidence; measures obviously essential to the existence and constitution of courts of justice.(*a*)

Service. The writ of subpœna, when sued out is to be regularly served on the witness; and as only four witnesses can be included in one writ or subpœna,(1) several writs are frequently necessary.(*b*) In order to save expense, it is settled, that service of a ticket, containing the substance of the writ, will be as effectual as service of the writ itself.(2)(*c*) The writ or ticket should be served When. personally on the witness,(3) and in reasonable time(*d*) before the day of trial, that he may suffer the less inconvenience from his attendance on the court.(4) Notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too late.(5) If the witness, whose attendance is required, be a married woman, it will be necessary to serve the subpœna upon her personally, and the tender of the expenses should be made to her, and not to her husband.(6) If a cause appointed for one sitting be made a *remanet*, the subpœna must be re-sealed and re-served.(7)

Privilege from arrest. Witnesses, as well as the parties in a suit, are protected by courts of justice and privileged from arrest,(*e*) during the necessary time consumed by them in going to the place where their attendance is required, in staying there for the purpose of such attendance, and in returning from the place.(8)(*f*) And, in ordinary cases, it is not necessary for the protection of a witness, that he should have been served with a subpœna, if, upon appli- For what time. cation to him, he consented to attend without one.(9)(*g*) A reasonable time is allowed to the witness for going and returning; and

(1) Cowp. 846.

(2) Goodwin v. West, Cro. Car. 522, 540. Maddison v. Shore, 5 Mod. 355, S. P. See form of ticket on writ of inquiry, in Tidd. App. p. 241; and on trial, id. p. 331.

(3) Smalt v. Whitmill, 2 Stra. 1054. Wakefield's case, Rep. temp. Hard. 313, S. P.

(4) Hammond v. Stewart, 1 Stra. 509.

(5) 2 Tidd. Pr. 856.

(6) Cro. El. 122. 1 Jon. 430, S. P.

(7) Sydenham v. Rand, 24 G. 3. K. B., cited from MS. in 2 Tidd. Pr. 855.

(8) 2 Roll. Ab. 272. Lightfoot v. Cameron, 2 Black. Rep. 1113. Meekins v. Smith, 1 H. Bl. 636. Randall v. Gurney, 3 Barn. & Ald. 252.

(9) Lord Kenyon, C. J., in Arding v. Flower, 8 T. R. 536. 1 Tidd. Pr. 198.

(*a*) See Note 8, p. 13. (*b*) See Note 9, p. 14. (*c*) See Note 10, p. 14. (*d*) See Note 11, p. 14. (*e*) See Note 12, p. 14. (*f*) See Note 13, p. 15. (*g*) See Note 14, p. 16.

in making this allowance the courts are disposed to be liberal.(1)(*a*) This privilege has been extended to a party in the suit attending on an arbitration under an order of *nisi prius*,(2) or on the execution of a writ of inquiry,(3) and to persons attending the insolvent debtors' court.(4) A bankrupt, also, attending a meeting of commissioners in pursuance of a notice, and witnesses attending upon summons, are protected from arrest at the suit of a creditor.(5)(*b*) And, by the mutiny-act, witnesses are privileged from arrest during their necessary attendance on courts martial, in the same manner as witnesses attending a court of law.(*c*) A witness is not privileged from being arrested by his bail: the bail may take him, after he has finished his evidence, for the purpose of surrendering him.(6)(*d*)

To whom.

A subpœna can have no effect, where the witness is in custody, or on board a ship under the command of an officer, who refuses to allow his attendance.(*e*) The course, then, is to sue out a writ of *habeas corpus ad testificandum*;(7)(*f*) for which purpose application ought to be made to the court or to a judge, upon affidavit of the party applying, stating that he is a martial witness, and willing to attend.(8)(*g*) Upon this application the court in its discretion will make a rule, or the judge will grant his *fiat*(*h*) or a writ,(9) which is then sued out, signed, and sealed.(10)(*i*) The writ should be left with the sheriff or other officer, who will be bound to bring(*k*) up the body, on being paid his reasonable charges.(*l*) If the witness be a prisoner of war, he may be examined

Habeas corpus ad testificandum.

(1) 2 Black. Rep. 1113. Hatch v. Blisset, Gilb. Cas. 308, cited 2 Stra. 986. 13 East, 16, n.(*a*) Willingham v. Matthews, 2 Marshall, Rep. 57. See Randall v. Gurney, 3 Barn. & Ald. 252, and 1 Tidd. Pr. 198, where the cases on this subject are collected.

(2) Spencer v. Stewart, 3 East, 89. Randall v. Gurney, 3 Barn. & Ald. 252.

(3) 4 Moore, 34.

(4) 6 Taunt. 356.

(5) 5 Geo. 2. c. 30, § 5. 6 G. 4. c. 16. s. 117. Arding v. Flower, 8 T. R. 534. 2 Blac. Rep. 1142. Kidder v. Williams, 4 T. R. 377. Spencer v. Stuart, 3 East, 89. Ex parte Byne, 1 Ves. & Beam. 316. 1 Tidd. Pr. 199.

(6) Ex parte Lyne, 1 Ry. & Mo. N. P. R. 132. Lord Tenterden refused to discharge him, on motion.

(7) Tidd. Pr. 858. Ex parte Tillotson, 1 Stark. N. P. C. 476. See form of affidavit in Tidd's App. c. 33, s. 37, p. 332.

(8) R. v. Roddam, Cowp. 672. On the trial of Sir John Frein for high treason, Lord C. J. Holt, on the application of the prisoner, ordered his clerk to prepare a warrant for a *habeas corpus*, 4 St. Tr. 600, fol. ed. 13. Howell's St. Tr. 3. And see Layer's case, Fortesc. Rep. 396.

(9) R. v. Burbage, 3 Burr. 1440.

(10) Tidd. Pr. 858.

(*a*) See Note 15, p. 16. (*b*) See Note 16, p. 16. (*c*) See Note 17, p. 16. (*d*) See Note 18, p. 17. (*e*) See Note 19, p. 17. (*f*) See Note 20, p. 18. (*g*) See Note 21, p. 18. (*h*) See Note 22, p. 19. (*i*) See Note 23, p. 19. (*k*) See Note 24, p. 19. (*l*) See Note 25, p. 19.

by consent on interrogatories, but cannot be brought up without an order from the secretary of state.(1)(*a*)

It has been doubted, whether persons in custody could be brought up as witnesses by writ of *habeas corpus*, to give evidence before any other courts except those at Westminster; but now, by stat. 43 G. 3, c. 140, it is enacted, that a judge of either of the courts may, at his discretion, award such writ for bringing a prisoner, detained in any gaol in England, before a court martial, or before commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting by virtue of any royal commission or warrant. And the stat. 44 G. 3, c. 102, authorizes the judges of the court of King's Bench, or Common Pleas, or Exchequer, in England or Ireland, or justices of oyer and terminer or gaol delivery (being such judge or baron,) to award writs of *habeas corpus* for bringing prisoners detained in gaol before any of the courts, or any sitting at *nisi prius*, or before any court of record in those parts of the United Kingdom, to be there examined as witnesses in any civil or criminal cause. By the same act, justices of great sessions in Wales and the county palatine of Chester have the same authority within the limits of their jurisdiction. The application for a writ of *habeas corpus* under this statute ought to be made to a judge out of court.(2)(*b*)

43 G. 3. c. 140.

44 G. 3. c. 102.

Payment of expenses.

No witness is bound to appear in civil cases, unless his reasonable expenses, for going to and returning from the trial, and for his reasonable stay at the place, be tendered to him at the time of serving the subpœna; nor, if he appears, is he bound to give evidence, till such charges are actually paid or tendered,(3)(*c*) except he reside within the weekly bills of mortality, and be summoned to give evidence within them, in which case it is usual to leave a shilling with the subpœna ticket.(4) The necessity of this previous tender arises from the special provision in the act of Elizabeth, be-

(1) Furly v. Newham, 2 Doug. 419.

(2) Gordon's case, 2 Maule & Selw. 582.

(3) Chapman v. Poynton, 2 Stra. 1150. 13 East, 16 n. *a*. S. C., more fully stated. Bowles v. Johnson, 1 Blac. Rep. 36. Puller v. Prentice, 1 H. Blac. 49. Hallett v. Mears, 13 East, 15. Ex parte Roscoe, 1 Merivale, Rep. 191.

(4) 3 Blac. Com. 379. Tidd. Pr. 856, 865.

(*a*) See Note 26, p. 21. (*b*) See Note 27, p. 21. (*c*) See Note 28, p. 28.

fore cited. If a necessary witness is brought over from a foreign country, whether brought after or before the commencement of an action, the reasonable expenses both of his coming to this country, and of his subsistence here pending the action, and of his return, will be allowed in the taxation of costs, provided he is brought over *bona fide* for the purposes of the particular action(1). With respect to compensation for loss of time, the general rule is, that it ought not to be allowed;(2) some compensation has been usually allowed to medical men and attornies, but not to others.(*)(*a*)

Foreign witness.

For loss of time.

If a witness, who has been duly served with the writ, and has had a tender of the reasonable expenses, omit to attend at the trial without a sufficient cause, he is liable to be proceeded against in one of three ways. The first and more usual course of proceeding, is by attachment for a contempt of the process of the court,(3) which appears to be as ancient as the common law itself.(4) In order to ground this summary proceeding, it will not only be necessary to show an ill motive in the witness, or negligence and inattention to the process of the court, but also to prove, that the witness was personally served,(5) and that his reasonable expenses were paid or tendered at the time of the service of the subpœna.(6)(*b*) A second remedy is by a special action on the case for damages, at common law.(7)(*c*) The third, and last, is an action on the stat. 5 Eliz. c. 9, s. 12, for the penalty of £10, and also for the further recompense recoverable under that statute.(*d*) This action for a further recompense will not lie, unless the amount has been previously assessed by the court, out of which the process issued: neither the jury nor the judge at *nisi prius* being competent to

Remedies for non-attendance.

Attachment.

Action.

(1) Tremain v. Faith, 6 Taunt. 88. 1 Marshall, 563, S. C.

(2) Moor v. Adam, 5 Maule & Selw. 156. Willis v. Peckham, 1 Brod. & Bing. 515. Lowry v. Doubleday, 5 Maule & Selw. 159, (b.) Severn v. Olive, 3 Brod. & Bing. 72. 6 Moore, 239.

(3) 2 Ld. Raym. 1528. 1 Stra. 510. 2 Stra. 810, 1054, 1150. Cowp. 846. Doug. 561. Blandford v. De Tastet, 5 Taunt. 260. Horne v. Smith, 6 Taunt. 9. 1 Marshall, 410, S. C. Barrow v. Humphreys, 3 Barn. & Ald. 598.

(4) See Pearson v. Iles, Doug. 561. Amey v. Long, 9 East, 483.

(5) 2 Stra. 1054.

(6) Ante, p. 6. Tidd. Pr. 858.

(7) Pearson v. Iles, Doug. 561.

(*) Lord Ellenborough, in the case of Moor v. Adam, after citing the case of Lowry v. Doubleday, added, "he believed the practice had been to make allowance to medical men and attornies, but not to others."

(*a*) See Note 29, p. 24. (*b*) See Note 30, p. 28. (*c*) See Note 31, p. 28. (*d*) See Note 32, p. 28.

make the assessment.(1) When the assessment has been made, an action of debt will lie.(*a*)

In criminal cases.

The means of compelling the attendance of witnesses in criminal cases are of two kinds;(2) first, by process of subpœna,

Subpœna.

for disobedience to which the person served with the process is liable to an attachment;(3)(*b*)(*c*) or, secondly, the justice or coroner, who takes the information of witnesses, may, at the time of

Recognizance.

taking it, or at any time before the trial, bind them over to appear; and, if they refuse to come or to be bound over, may commit them for a contempt.(4) This proceeding by recognizance is the ordinary and more effectual method.(*d*)

Subpœna for prisoner.

In prosecutions for misdemeanors the defendant has been, from the earliest times, allowed the writ of subpœna. But prisoners have no right, by the common law, to this process in capital cases, without the special order of the court.(4) Formerly, in such cases, a prisoner was put upon his trial under a twofold disadvantage; he was unable to compel the attendance of witnesses, and, if they voluntarily attended, their evidence, not being given on oath, received less credit than the evidence

7 W. 3, c. 3.

on the part of the prosecution.(*) By stat. 7 W. 3, c. 3, s. 7, all persons indicted for any high treason, whereby corruption of blood may ensue, shall have the like process of the court, where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear

7 Ann. st. 1, c. 9.

against them. And now, as the stat. 1 Ann. st. 1, c. 9, s. 3, enacts, that all witnesses, on behalf of a prisoner on a trial for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury,

(1) Pearson v. Iles, Doug. 561. Ante, p. 3.

(2) 2 Hale P. C. 281. Bennet v. Watson, 3 Maule & Selw. 1.

(3) R. v. Ring, 8 T. R. 585. The subpœna in this case issued from the crown-office, requiring the witness to appear at the ensuing assizes in the country; and the court of K. B. granted an attachment.

(4) 4 Blac. Com. 359. 2 Hawk. P. C. c. 46, s. 17.

(*) Many instances occur among the early State Trials, of witnesses refusing to come into court to be examined on behalf of the accused: and there are some, in which witnesses have been peremptorily sent out of court by the judge, and not allowed to give evidence.

(*a*) See Note 33, p. 28. (*b*) See Note 34, p. 29. (*c*) See Note 35, p. 29. (*d*) See Note 36, p. 29.

process of subpœna may be taken out by the prisoner in any case whatever.(*a*)

In order to provide for the appearance of witnesses, to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in any part of the United Kingdom, it is enacted by a late act of parliament, stat. 45, G. 3, c. 92, s. 3, and s. 4, that the service of a writ of subpœna or other process, in any one of the parts of the United Kingdom, shall be as effectual to compel his appearance in any other of the parts of the same, as if the process had been served in that part where the person is required to appear. And if the person served does not appear, the court, out of which the process issued, may transmit a certificate of the default in the manner specified by the act, and the court, to which the certificate is transmitted, may punish the person for his default, as if he had refused to appear to process issuing out of that court: provided it appear, that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence and of returning, was tendered to the person making default, at the time when the subpœna or other process was served upon him. 45 G. 3. c 92.

Compensation.

In civil proceedings, as we have seen, a witness is not obliged to attend or give evidence, unless his expenses are duly tendered; but, in criminal prosecutions, witnesses are bound to appear unconditionally.(1)(*b*) On the other hand, it is reasonable and highly expedient, that when they attend on behalf of the public, a fair compensation should be given them for their trouble and necessary expense. Formerly, however, the law provided no means for reimbursing them; a defect in our judicial administration which was at length remedied by stat. 27 G. 2, c. 3, s. 3. This statute enacts, that "when any poor person shall appear on recognizance to give evidence against another accused of grand or petit larceny or other felony, the court may, on the oath of such person, and on consideration of his circumstances, in open court, order the treasurer of the county or place in which the offence shall have been com-

Costs in felonies.

27 G. 2, c. 3.

(1) 4 Hawk. b. 2, c. 46, s. 173. 2 Hale P. C. 282. See also Preambles of stat. 27 G. 2, c. 3, s. 3, and stat. 18 G. 3, c. 19, s. 7.

(*a*) See Note 37, p. 30. (*b*) See Note 38, p. 30.

mitted, to pay such sum of money as to the court shall seem reasonable, for his time, trouble, and expense."

As this statute extended only to poor persons who appeared on recognisance, and not to such as appeared on subpœna to give evidence, it was afterwards deemed reasonable by the legislature, that every person so appearing on recognizance or subpœna, should be allowed his reasonable expenses; and also, in case of poverty, a satisfaction for his trouble and loss of time. The stat. G. 3, c. 19, s. 8, therefore enacted, that "where any person shall appear on recognizance or subpœna, to give evidence as to any grand or petit larceny or other felony, whether any bill or indictment be preferred or not to the grand jury, it shall be in the power of the court (provided the person shall, in the opinion of the court, have *bona fide* attended in obedience to such recognizance or subpœna) to order the treasurer of the county or division, in which the offence shall have been committed, to pay him such sum as to the court shall seem reasonable, not exceeding the expenses which it shall appear to the court the said person was *bona fide* put unto by reason of the said recognizance and subpœna, making a reasonable allowance, in case he shall appear to be in poor circumstances, for trouble and loss of time."

8 G. 3, c. 19.

58 G. 3, c. 70, s. 4. The stat. 58 G. 3, c. 70, s. 4, provides, that, in case of felony, the court, before whom a person shall be prosecuted or tried, shall be empowered (at the request of any person bound to prosecute, or subpœnaed to give evidence, and who shall appear to prosecute or give evidence, or who shall appear to the court to have been active in the apprehension of a person accused of some one of the offences mentioned in several recited acts) to order the sheriff or treasurer of the county to pay to the prosecutor and witnesses, and to the person concerned in such apprehension, as well the costs, charges, and expenses, which the prosecutor shall be put to in preferring the indictment, as also such sum of money as to the court shall seem reasonable and sufficient to reimburse them for their expenses in attending before the grand jury to prefer the indictment, and in carrying on the prosecution, and also to compensate them for the loss of time and trouble in the apprehension and

prosecution.(*) The 8th section further provides, that no person shall be entitled to any such costs or expenses for attending the court, unless he shall have been bound by recognizance, or have previously received a subpœna to attend, or a written notice for that purpose from the prosecutor, his agent, or his attorney.

7 G. 4, c. 64.

The latest statute on this subject is that of 7 G. 4, c. 64, s. 22, which enacts, that the court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna, to prosecute or give evidence against any person accused of any felony, to order payment to the prosecutor of the costs and expenses, which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sum of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the court, when any person shall, in the opinion of the court, *bona fide* have attended the court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bona fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time; and the amount of expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and

Costs of indictment.

Of attendance.

Before examining magistrate.

(*) The opinion of the judges, on the construction of this section, is stated in The Crown Circ. Comp. p. 10, 9th ed.

compensation shall be ascertained by the proper officer of the court.

Case in misdemeanors.

The act last mentioned gives authority also to the court, in certain cases of *misdemeanor*, to order the payment of the costs and expenses of prosecutions. This statute provides, that where any prosecutor or other person shall appear before any court on recognizance or subpœna, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property, knowing the same to have been stolen; of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, or any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury; every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall be lawful for the court, where any person shall have *bona fide* attended the court, in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: provided, that in cases of misdemeanor, the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate(*a*).

Tender.

It has been doubted(1), whether a witness may not lawfully refuse to obey a subpœna on a criminal prosecution, as well as in a civil suit, unless he has a tender of his reasonable expenses; (*b*) and the doubt is suggested in consequence of a provision in the stat. 45 G. 3, c. 92, which (after enacting, that service of subpœna on a

(1) See Chitty's Treatise on Criminal Law, vol. i 612.

(*a*) See Note 39, p. 80. (*b*) See Note 40, p. 30.

witness in any one of the parts of the United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear) provides, that he shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpœna, for defraying his expenses of coming, attending, and returning. One object, which the legislature had in view, was to provide for the appearance of witnesses in any of the parts of the United Kingdom, and they are therefore subject to punishment for non-attendance. On the other hand, as the expenses of going from one of the parts of the United Kingdom to either of the other parts would necessarily be great, they were allowed to insist on the payment of their reasonable charges, previous to the journey; a provision more especially necessary at the time of passing this statute, when, in some parts of the kingdom, witnesses were not entitled to any compensation for attending to give evidence in criminal cases.(1) But as there is no statute respecting a tender of expenses in the case of a criminal prosecution, except that mentioned above, (which is confined to the case where the process is served in one of the parts of the United Kingdom for the appearance of the witness in another of the parts,) and as the tender of expenses in civil suits is under the special provision of an act of parliament, the general rule in ordinary cases (whether of felony or misdemeanor) appears to be, that witnesses, making default on the trial of criminal prosecutions, are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpœna; although the court would have good reason to excuse them for not obeying the summons, if, in fact, they had not the means of defraying the necessary expenses of the journey.(2).

Commissioners of bankrupt may summon any persons whom they believe capable of giving information concerning the trade, dealings, or estate of the bankrupt, &c. and if the witness does not come at the time appointed, they may order him to be apprehended(3). Every witness summoned to attend before commis- Commissioners of bankrupt.

(1) In Ireland, the expenses of witnesses in case of felony were first allowed by st. 55 G. 3. c. 91.

(2) See ante, p 9. (1.)

(3) 6 G. 4. c. 16. s. 33.

sioners shall have his necessary expenses tendered to him, in the same manner as is required on service of subpœna to witnesses in actions at law.(1)

Justices. Magistrates have not, in general any authority to compel the attendance of witnesses for the purpose of a summary trial, except under the special provision of acts of parliament. When a statute requires justices of peace to take the examination of persons bringing a prisoner before them on suspicion of felony, it incidentally gives them a power to examine upon oath, and to summon by their warrant any other persons who appear to be material witnesses for the prosecution, to come before them and give evidence. And it may be laid down as a general rule, that wherever magistrates are authorized by act of parliament to hear and determine, or to examine witnesses, they have incidentally a power to take the examination on oath.(2)(*a*)

Courts martial. Witnesses, who neglect to attend on courts martial, after being duly summoned, are liable to be attached in the court of King's Bench, &c. as if they had neglected to attend a trial in some crim-

Commissioners of inclosure. inal proceeding in that court.(3) And commissioners of inclosure, under the general inclosure act, stat. 41 G. 3, c. 109, s. 33, 34, have a power to summon in writing any person within a certain distance, to appear before them and to be examined; and if the person summoned refuse to appear, he will be subject to a penalty.

Witness abroad. When a material witness resides abroad, or is going abroad, and cannot attend at the trial, the party requiring his testimony may move the court in term time, or may apply to a judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse* before one of the judges of the court, if the witness reside in town, or, if he reside in the country or abroad, before com-

Order for examination. missioners specially appointed and approved by both parties.(4)(*b*) The rule or order for such examination cannot be obtained

(1) 6 4. c. 16. s. 35.
(2) Dalt. Just. c. 6. Lamb. 517. 12 Rep. 131. And see stat. 15 G. 3. c. 39, which gives such power, for the purpose of levying penalties or making distresses.
(3) Stat. 55 G. 3. c. 108. s. 28.
(4) 2 Tidd. Pr. 860.

(*a*) See Note 41, p. 31. (*b*) See Note 42, p. 32.

without the consent of both parties, as the depositions are only secondary evidence. Without this consent, therefore, the court will not give the plaintiff leave to examine upon interrogatories an attesting witness to a deed, or to give the examination in evidence at the trial, on the ground that the witness is incapacitated by illness from attending, and unlikely ever to be able to attend, though it appear by affidavit that the defendant had at one time admitted the execution of the deed; nor will the court, on this ground, grant a rule for dispensing with the attendance of the witness.(1) And though the court will not compel the other party to consent, yet, if necessary, it will assist the party applying by putting off the trial (that there may be an opportunity of filing a bill in equity,) until the consent is obtained, or the witness returns; and if, after all, the defendant should refuse, the court will not give him judgment as in case of nonsuit.(2) When a party, after obtaining leave by consent examines witnesses abroad on depositions, he will not be entitled to any allowance, in the taxation of costs, for the expense of taking the depositions, although he may succeed in the action.(3) The same rule prevails in the court of chancery; if a party applies to that court for a commission to examine witnesses, he must pay the expenses.

Costs of examination.

Where a cause of action has arisen in India, or any offence has been committed there, which is tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by stat. 13 G. 3, c. 63, s. 40, 44.(4) The evidence of witnesses in India may also be obtained, in support of a bill for a divorce in parliament, by the provisions of stat. 1 G. 4, c. 101; and in the case of a prosecution for an offence committed abroad by any person employed in the public service, the evidence of witnesses resident abroad may be obtained in the mode pointed out by stat. 42 G. 3, c. 85.(5) The stat. 54 G. 3, c. 15, which was passed for the purpose of facilitating the recovery of debts

Witnesses in India.

(1) Jones v. Brewer, 4 Taunt. 47.

(2) Furly v. Newnham, 2 Doug. 419. Mostyn v. Fabrigas, Cowp. 174. Calliard v. Vaughan, 1 Bos. & Pull. 211. As to to the admissibility of depositions on interrogatories, see *infra*, part 2, c. 4, s. 2.

(3) Stephens v. Crichton, 2 East, 259. Taylor v. Roy. Ex. Ass. Comp. 8 East, 393.

(4) Grillard v. Hogue, 1 Brod. & Bing. 519.

(5) R. v. Jones, 8 East, 31.

in the courts of law in New South Wales, prescribes the mode of obtaining the affidavits of witnesses, resident in this country, and makes them equivalent to *viva voce* proof in open court, or to examinations under commissions.

Material witness absent.

If the defendant is unable to proceed to trial, on account of the absence of a material witness, he may move the court in term-time, or apply to the judge in vacation, on an affidavit of the facts to put off the trial till the next term; or in the Common Pleas, if necessary, to a more distant period.(1) An application to put off a trial beyond the existing sittings, or from sittings to sittings, is not allowed on the part of the plaintiff; for he has the power at any time of withdrawing the record; if he is not prepared to try the cause. But where, from the sudden indisposition of a witness, who may be able to attend in the course of a day or two, or for any other temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, yet has ground to believe that he shall be able to try before the sittings are over, it would be too much to make him, in such a case, withdraw his record; and a judge at *nisi prius* will therefore make an order for the trial to stand over, till the witness is likely to attend.(2) It is a rule in the court of Common Pleas, that the trial of a cause can never be put off on the consent of the parties and counsel, at the sittings at *nisi prius*, but the plaintiff must either proceed to try or withdraw his record.(3)

Motion to put off trial.

By plaintiff.

Before the court will consent to put off the trial on account of the absence of a material witness, it requires to be satisfied that injustice would be done by refusing the application, and that the party, who makes the application, has not conducted himself unfairly, nor been the cause of any improper delay.(4) The rule will not be granted to the defendant, after he has pleaded a sham plea, by which a trial has been lost, (unless he consent to pay the money into court;)(5) nor, where the testimony of the absent witness is intended to set up an odious defence, (as, that the plaintiff is slave to the defendant, and therefore

By defendant.

(1) Pr. Reg. 398. Tidd Pr. 831. See form of affidavit in Tidd. App. 312.

(2) Ansley v. Birch, 3 Campb. N. P. C. 333, by Lord Ellenborough.

(3) 2 Taunt. 221.

(4) Saunders v. Pitman, 1 Bos. & Pull. 33.

(5) Tidd. Pr. 831.

cannot recover in the action, or that he is an alien enemy, &c. (1); nor will it grant the rule for the purpose of giving the defendant an opportunity, which he has once lost by his own neglect, of applying to a court of equity for a commission. (2)

When a motion is about to be made to a judge at *nisi prius*, for putting off the trial of a cause on account of the absence of a witness, notice should first be given to the plaintiff's attorney, with a copy of the intended affidavit. This affidavit ought regularly to be made by the defendant himself; but if he is abroad or out of the way, it may be made by his attorney or a third person. (3) The affidavit generally states, that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavored without effect to get him subpœnaed; but that he is in hopes of procuring his future attendance. (4)(*a*) Affidavit.

CHAP. II.

Of the Incompetency of Witnesses from Want of Understanding.

When a witness appears, he must be regularly sworn, unless an objection is made to his competency; (*b*) and the course of proceeding is, that the party, who objects to the witness, should state all his objections at the same time, in order to prevent unnecessary delay. (5) An exception to the credibility of a witness cannot exclude him from being sworn. The exception of kindred, for example, although it is a good cause of challenge against a juror, is not an objection to the competency of a witness; a father is a competent witness for or against his son, and a master for his servant, or a servant for his master. Such exceptions may affect the credibility, but they do not affect the competency of witnesses. Exceptions to witness.

(1) Robinson v. Smyth, 1 Bos. & Pul. 454.
(2) Calliard v. Vaughan, 1 Bos. & Pull. 212.
(3) Peake, N. P. C. 97.
(4) See form of affidavit, Tidd. Pr. Appx. 312.
(5) Lord Lovat's case, 9 St. Tr. 652., fol. ed. 18 Howell's St. Tr. 609 S. C.

(*a*) See Note 43, p. 41. (*b*) See Note 44, p. 58.

As it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine, whether a witness is competent, or the evidence admissible. Whether there is *any* evidence, is a question for the judge: whether it is *sufficient*, is a question for the jury. (1)(*d*) And whatever antecedent facts are necessary to be ascertained, for the purpose of deciding the question of competency or admissibility of evidence, as, for example, whether a child understands the nature of an oath—or whether the confession of a prisoner was voluntary—or whether declarations, offered in evidence as dying declarations, were made under the immediate apprehension of death—these, and other facts of the same kind, are to be determined by the court, and not by the jury.

Causes of incompetency.

By the law of England the objections to the competency of witnesses are fourfold. The first ground of incompetency is want of reason or understanding: a second ground is defect of religious principle: a third ground arises from conviction of certain crimes, or from infamy of character: the fourth and most general cause of incompetency is interest. Either of these grounds of incompetency will exclude the witness from giving any kind of evidence. "I find no rule less comprehensive than this," said Mr. Justice Lawrence, in the case of Jordaine v. Lashbrooke(2), "that all persons are admissible witnesses, who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and who are not influenced by interest." (*e*)

An inquiry into these several causes of incompetency forms the subject of the four following chapters.

First, as to incompetency far want of understanding.

Idiots, &c.

Persons, who have not the use of reason, labor under a physical disqualification, and from their infirmity are utterly incapable of giving evidence. Insane persons, idiots, and lunatics under the influence of their malady, are in this situation. (3)(*f*)

(1) By Buller J. Comp. of Carpenters, &c. v. Haywood, Doug. 775. Bull. N. P. 293.

(2) 7 T. R. 610.

(3) Co. Lit. 6 b. 6 Com. Dig. tit. Testmoigne, A. 1.

(*d*) See Note 45, p. 58. (*e*) See Note 46, p. 58. (*f*) See Note 47, p. 60.

But lunatics, and other persons though subject to temporary fits of insanity, may yet be witnesses in their lucid intervals, if they have sufficiently recovered their understandings. (1)(*g*) And a person born deaf and dumb is not on that account incompetent, but, if he has sufficient understanding, may give evidence by signs with the assistance of an interpreter. (2)(*h*)

Children.

A witness must not only have a competent share of reason, but also know the nature of an oath. Children, therefore, who are not able to understand its moral obligation, cannot be examined. (3) There seems to be no precise age fixed, at which infants are excluded from being witnesses. At one time, indeed, their age was considered as the criterion of their competency; and it was a general rule, that none could be admitted under the age of nine years, very few under ten (4); which was in some measure denying them the protection of law against secret acts of violence. (5) A more reasonable rule has been since adopted: and the admissibility of children is now regulated, not by their age, but by their apparent sense and understanding.(*i*) In Brazier's case, on an indictment for assaulting an infant of five years of age with intent to ravish her, it was agreed by all the judges, that children of any age might be examined on oath, if capable of distinguishing between good and evil: but that they cannot be examined, in any case, without oath (6)(*j*) This is now the established rule in all cases, criminal as well as civil, and whether the prisoner is tried for a capital offence, or for one of an inferior nature. When the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary, for the purpose of justice, to put off the trial of the prisoner, directing that the child in the mean time should be properly instructed. If the jury is sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the proper course is not to discharge the jury, but to direct an acquittal. (7)(*k*).

(1) Com. Dig. tit. Testmoigne, A. 1.
(2) Ruston's case, 1 Leach, Cr. C. 455.
(3) Com. Dig. tit. Testmoigne, A. 1. Bull. N. P. 293. Gilb. Ev. 130.
(4) R. v. Travers, 2 Stra. 700, and cases in East. P. C. 442, S. P. 1 Hal. P. C. 302. 2 Hal. P. C. 278.
(5) Bull. N. P. 293.
(6) Brazier's case, 1779. 1 East. P. C. 443, 444. Bull. N P. 293, 1 Leach, Cr. C. 237. 4 Black. Com. 214.
(7) R. v. Wade, 1 Ry. Mo. Cr. C. 86.

(*g*) See Note 48, p. 60. (*h*) See Note 49, p. 61. (*i*) See Note 50, p. 61. (*j*) See Note 51, p. 61. (*k*) See Note 52, p. 61.

Statment by children.

If a child is too young to be sworn, it follows as a necessary consequence, that any account, which it may have given to others, ought not to be admitted. On an indictment, therefore, for a rape on a child five years old, where the child was not examined, but an account of what she had told her mother, about three weeks after the transaction, was given in evidence by the mother, and the jury convicted the prisoner, principally, as was supposed, on that evidence: the judges, on a case reserved for their opinion, thought the evidence clearly inadmissible, and the prisoner was accordingly pardoned. (1)*

Confirmatory evidence.

"Where the evidence of children is admitted," says Sir William Blackstone (2), "it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion." It seems, however, impossible to lay down any general rule on this subject, applicable to all cases. A prisoner may be legally convicted on such evidence, alone, and unsupported; and whether the account of the witness requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the child has given his evidence. The evidence may be so circumstantial, so plain and clear, and so free from all mixture of partiality and ill will, as to leave no reasonable doubt of the prisoner's guilt, although it stands unsupported by other witnesses.

CHAP. III.

Of Incompetency from Defect of Religious Principle.

The second ground of incompetency, which has been mentioned, is defect of religious principle.

(1) R. v. Tucker, 1808. MS. See p. 19. 1 Aik. 29. also R. v. Brazier, 1 East, P. C. 443, (2) 4 Com. 214.

* By the law of Scotland, children cannot be examined on oath under the age of twelve: but their declarations, it seems, may be taken without oath, and left to the consideration of the jury. See Burnett on the Crim. Law of Scotland, p. 391., and Hume's Comment, on the Law of Scotland, vol. ii. 339.

All witnesses, before they are examined in our courts of justice, are required to take an oath, by which they appeal to the Supreme Being for the truth of the evidence which they are about to give. This necessarily implies a belief, that by the laws of God truth is enjoined, and falsehood punished. It is not sufficient, that a witness believes himself bound to speak the truth from a regard to character or to the common interest of society, or from fear of punishment. (1) Such motives have indeed their influence, and may come in aid of the religious obligation, but they are of a nature so capricious and infirm, and so liable to be perverted, as to afford little or no security for the observance of truth. Our law, therefore, like that of most other civilized countries, requires a witness to believe that there is a God and a future state of reward and punishment, and that by taking the oath he imprecates the Divine vengeance upon himself, if his evidence shall be false. (2)* Oath.

Atheists, and such infidels as profess not any religion, that can bind their consciences to speak the truth, are excluded from being witnesses. (3) Lord Coke, indeed, says generally, that an infidel cannot be a witness (4), in which denomination he intended to comprise Jews as well as Heathens (5): and Mr. Serjeant Hawkins thought it a sufficient objection to the competency of a witness, that he believed neither the Old nor the New Testament. (6) Lord Hale, however, was of a different opinion, and strongly points out the unreasonableness of excluding indiscriminately all Heathens from giving evidence, as well as the inconsistency of compelling them to swear in a form, which they may possibly not consider binding. "It were a very hard case," he Atheists. Infidels.

(1) Ruston's case, 1 Leech, Cr. C. 455.
(2) White's case, 1 Leach, Cr. C. 482. 1 Atk. 19, 48.
(3) Bull. N. P. 292. 1 Atk. 40, 45, 48. Gilb. Ev. 129.
(4) Co. Lit. 6. *b*.
(5) 2 Inst. 506. 3 Inst. 165. 1 Atk. 43. Willes Rep. 541.
(6) Hawk. P. C. b. 2, c. 46, s. 148.

* Peers of parliament, when examined as witnesses, take the judicial oath in the common form, as other persons. See a note, on this subject, in 2 Howell's St. Tr. 772.

The practice formerly was, not to examine, upon oath, witnesses called on the part of a *prisoner*, in trial for treason or felony. This practice was altered in case of treason, by st. 7. W. 3. c. 3.; and in cases of felony, by st. 1 Ann. st. 2. c. 9.

says, "if a murder, committed here in presence only of a Turk or a Jew, should be dispunishable, because such an oath should not be taken, which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the courts of England." (1) All doubts upon the subject are now removed. In the celebrated case of Omichund and Barker, (which came before Lord Chancellor Hardwicke, assisted by Lee C. J., Willes C. J., and Parker C. B.) it was solemnly decided, that the depositions of witnesses professing the Gentoo religion who had been sworn according to the ceremonies of their religion under a commission out of Chancery, ought to be admitted in evidence. (2) And it may now be considered as an established rule, that infidels of any other country, who believe in a God, the avenger of falsehood, ought to be received here as witnesses; but infidels, who believe not that there is a God, or a future state of rewards and punishments, cannot be admitted in any case. (3)(*l*)

Form of swearing.

With regard to the ceremony or form of administering an oath, that form is obviously the best which most clearly conveys the meaning of the oath, and most forcibly impresses its obligation. (4) And since this is not an essential part of the oath, but entirely of human institution, and has varied in different times and countries, though the substance of the oath must be the same in all, it is obviously necessary to allow men to swear according to the peculiar ceremony of their religion, that is, in the manner which they consider binding on their conscience. "Possibly," says Lord Hale, "they may not think themselves under any obligation, if sworn according to the usual style in the courts of England." (5) Jews have therefore been sworn in our courts, from the earliest time, on the Pentateuch (6); and no distinction appears ever to have been taken between their swearing in a civil or in a criminal case. In an old case, where

(1) 2 Hale, P. C. 229.
(2) Omichund and Barker, 1 Atk. 21. 1 Wils. 84, S. C. Willes, 538, S. C.
(3) Willes, 549. 1 Atk. 45. Fachina v. Sabine, Str. 1104. Morgan's case, 1 Leach, Cr. C. 64.
(4) For the description of the judicial oath, by our old writers, Fleta, Bracton, Britton; see 1 Atk. 22.
(5) 2 H. P. C. 279. 1 Atk. 42. 48.
(6) 1 Atk. 40, 42. Willes, 548. Cowp. 389.

(*l*) See Note 58, p. 62.

a witness refused to be sworn in the usual form, by laying his right hand on the book and kissing it afterwards, Glin C. J. ruled, that he might be sworn, by having the book laid open before him and holding up his right hand. (1) "In my opinion," said the Chief Justice, "he has taken as strong an oath as any other witness." On the trial of some of the rebels at Carlisle in the year 1745, a witness being sworn in the same manner, by holding up his hand, the point was referred to the judges for their opinion, and they all agreed in thinking the witness legally sworn. (2) There is at this day a sect in Scotland, who hold it to be idolatry to kiss the book; but their own form of swearing is much more solemn. (3) Common sense requires, that witnesses should be allowed to swear in that particular form which they consider binding on their conscience. A Quaker affirms the truth of what he states. A Jew swears on the Pentateuch, with his head covered. A Gentoo touches with his hand the foot of a Braimin. Mahometans are sworn on the Koran (4): and upon the same principle, all persons ought to be sworn according to the ceremonies of their peculiar religion. (5) Whatever be the form, the meaning of the oath is the same. It is an appeal to Heaven, calling upon God to witness what we say, and invoking his vengeance, if what we say be false. (*m*)

Examination previous to swearing.

The most correct and proper time for asking a witness, whether the form of administering the oath is such as will be binding upon his conscience, is previous to the administration of the oath. But as it may occasionally happen, that the oath is administered in the usual form, before the attention of the court or of the counsel is directed to it, that question may properly be afterwards asked. And if, in answer to such question, the witness shall declare in the affirmative, namely, that he considers the oath, taken by him, to be binding upon his conscience, it would be irrelevant to ask further, whether there be any other mode of swearing that would be more binding than that which

(1) Dutton v. Colt, 2 Sideaf. 6.
(2) By Gold J. in Mildrone's case, 1 Leach, Cr. C. 459. Mee v Reed, Peak N. P. C. 22, S, P.
(3) Lord Mansfield, Cowp. 390.
(4) Morgan's case, 1 Leach, Cr. C. 64., by Gold J. delivering the opinion of all the judges. Cowp. 390. Fachina v. Sabine, 2 Str. 1104.
(5) Omichund and Barker, 1 Atk. 21.

(*m*) See Note 54, p. 62.

has been used. (1) If the witness says, he considers the oath to be binding upon his conscience, he affirms, in effect, that in taking that oath he has called his God to witness, what he shall say will be the truth, and that he has imprecated the Divine vengence upon his head, if what he shall afterwards say is false; and when this is done, it would be perfectly unnecessary and irrelevant to ask any further questions. (2) Such an acceptance of the oath not only imposes upon the witness all its religious obligations, but, should he violate its sanctions, subjects him also to the temporal penalties consequent on the crime of perjury. (3)

Examination as to opinions.

The proper mode of examining a witness, for the purpose of trying his competency in religious principle, is not to question him as to his particular opinions, but to enquire generally, whether he believes in the existence of God and of a future state. In a case before Mr. Justice Buller, where a witness, who had been sworn on the Gospels, was asked, whether he believed in the Gospels on which he had been sworn, the question was objected to, and is said to have been overruled by the court. (4) This question appears to have been put after the swearing in chief, though before the examination of the witness. If it had been asked before the witness was sworn at all, it seems that it would have been regular; for if he had not believed in the Gospels, how could he have been effectually sworn upon them? The administration of an oath in such a case would be entirely nugatory; and evidence wou'd be given without any religious sanction, on the bare assertion of a witness. If the law requires an oath to be administered in a certain form, and a witness believes not in any form of religion, the consequence must necessarily be, that he cannot be sworn. (5)(*n*)

(1) Resolution of the judges delivered by the Lord Chief Justice in the proceeding on the Bill of Pains and Penalties, Aug. 24, 1820. In the case of the witness Gargiulo, p. 116, of the printed evidence. 2 Brod. & Bing. 284.

(2) By the Lord Chief Justice, on the same occasion

(3) The fact of a witness having assumed a false name, and swearing in the common form upon the Gospels, but discovered after the trial to be a Jew, is not a ground for a new trial. Sells v. Hoare, 3 Brod. & Bing. 432.

(4) R. v. Taylor, Peake, N. P. C 11.

(5) A tract has been written on this subject by Mr. Baron Smith, one of the Barons of the Court of Exchequer in Ireland.

(*n*) See Note 55, p. 63.

There appears to be no good reason for not admitting the solemn affirmation of a Quaker in all cases, as well as the oath of a Jew or Gentoo, or any other person, who thinks himself really bound by the mode and form in which he attests. Before the Revolution, Quakers, who refused to take a legal oath, were treated as obstinate offenders, and subject to penalties. (1) But these hardships were removed by the toleration act (2), which first allowed them to make a declaration of their fidelity to the state instead of taking an oath of allegiance, and exempted them from all pains and penalties on their making, if required, certain other declarations there prescribed. And by another statute, which passed about six years after(3), their solemn affirmation in courts of justice is admitted to have the same effect as an oath taken in the usual form, excepting only that on such affirmation they are not permitted to give evidence in criminal cases.(*o*) This exception against the testimony of Quakers in criminal prosecutions, which Lord Mansfield has called a strong prejudice in the minds of the great men who introduced the statute(4), has been continued in the several succeeding acts of the legislature on the subject.(5) The soundness and propriety of such a distinction between criminal and civil cases may well be questioned; unless it can be shown that evidence requires less sanction in civil cases than in criminal, or that Quakers, in making their solemn affirmation, do not consider themselves under a strict religious obligation to speak the truth. The affirmation of a Quaker, as Lord Mansfield observed in his excellent judgment in the case of Atcheson against Everett (6), is in substance the same as an oath; the form only is different; an affirmation is a most solemn appeal and attestation to God. Quakers.

The legislature, by not admitting the affirmation of Quakers in criminal cases, must be understood to mean causes technically criminal. (7) They may be received in penal actions; as, in an action for debt on the statute against bribery in elections (8); so, on a motion for an attachment for non-perform-

(1) St. 13 C. 2, c. 1.
(2) St. 1 W. & M c. 18, s. 13.
(3) St. 7 & 8 W. 3, c. 34.
(4) Cowp. 390.
(5) St. 8 G. 1, c. 6. St. 22 G. 2, c. 46, s. 36.
(6) Cowp 382.
(7) Cowp. 391.
(8) Atcheson *v.* Everett, Cowp. 382.

(*o*) See Note 56, p. 63.

ance of an award(1). or on a motion to quash an appointment of verseers(2); these proceedings being of a civil, not a criminal nature. But in all cases which are substantially of a criminal nature, the affirmation of a Quaker is inadmissible; as, in an appeal for murder (3), though it is in form a civil proceeding; so on a motion for an information for a misdemeanor(4), or on exhibiting articles of the peace (5), or on a motion for non-performance of an order of Court(6). Where the application to the court is *against* a Quaker, his affirmation may be received in his own defence, though the proceeding be of a criminal nature.(7)

It has been observed by Lord Mansfield(8), that Quakers are at present under some hardship, in not being able to call other Quakers as witnesses in their defence, on a charge of treason or felony; since, in these cases, witnesses on behalf of the prisoner are to be sworn, before they can give evidence, like witnesses for the crown(9); and no exception is made by the legislature, in order to give a prisoner the benefit of a Quaker's testimony.(*p*)

Excommunication.

It has been frequently laid down, that persons excommunicated are not competent witnesses, because it is supposed, that those who have been excluded from the church are not under the influence of any religion. The authority generally referred to in support of this rule, is a dictum of Sir Edward Coke, in the case of the Attorney General *v.* Griffith (10), concerning the oath of allegiance required of Popish recusants. He is there reported to have said, "By the statute 3 J. I, c. 5, every recusant convict is to be excommunicated; and therefore on my circuit I do not admit of them for witnesses between party and party, they being not competent witnesses." On the authority of this dictum, the rule has been commonly adopted by writers

(1) Taylor *v.* Scott, cited Cowp. 394. Powell v. Ward, cited Andr. 200.
(2) R. v. Turner, 2 Str. 1219.
(3) Castile v. Bainbridge, 2 Str. 856. Cowp. 392.
(4) R. v. Wych, 2 Str. 872. R v. Gardner, 2 Burr. 1117.
(5) R. v. Green, 1 Str. 527.
(6) Skipp v. Harwood. Willes, 291.; and see n. (*b*) ib., where the cases on this subject are collected.
(7) R. v. Shacklington, Andr. 201. n. R. v. Gardner, 2 Burr. 1117. Cowp 383, 392.
(8) Cowp. 391.
(9) St. 7 & 8 W. & M. c. 3. s. 1. 1 Ann. st. 2, c. 9, s. 3.
(10) 2 Bulstr. 155.

(*p*) See Note 57, p. 64.

on the subject of evidence; although the reason, upon which it is supposed to have been founded, would in the present day be generally exploded. But now, by a late act of the legislature, this objection has been entirely removed. The stat. 53 G. 3. c. 127, s. 2, 3, enacts, that no sentence of excommunication shall be pronounced by ecclesiastical courts in cases of contempt or disobedience to their order, and that persons excommunicated shall in no case incur any civil penalty or disability. 53 G. 3, c. 127.

CHAP. IV.

Of Incompetency from Infamy.

A THIRD cause of incompetency is infamy of character, proceeding from conviction of certain offences.

The conviction of an infamous crime followed by judgment, disqualifies a witness from giving evidence in courts of justice. This is strictly a legal objection, to be supported by strict legal proof; and nothing less than a conviction will disqualify. Here again is another striking instance, to show the distinction between competency and credibility. Witnesses of the most infamous and depraved character, though not credible, may yet be competent; and it frequently happens, that a witness is suffered to give evidence, because not absolutely disqualified by the rules of law, though at the same time he may be far lower in point of credit and real character, than another, who is at once excluded as incompetent. Writers on the subject of evidence, therefore, distinguish between the *infamia juris* and the *infamia facti*. Of these tests of infamy, the latter may destroy the credibility of a witness; but it is the former only that can destroy his competency. Competency Credibility.

In treating of this subject, it is proposed to consider, in the first section, what offences incapacitate, and how a witness may be restored to his competency: in the second, to consider the evidence of accomplices.

Sect. I.

What Offences incapacitate; and of the Mode of restoring Competency.

What crimes disqualify.

There are many offences, which our law considers such blemishes on the moral character, as to incapacitate from giving evidence in courts of justice. (1) Of this kind are treason, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, attaint of false verdict, (2) and other offences of the same description, which involve the charge of falsehood, and affect the public administration of justice. (3)

Felony.

The whole class of offences which come under the denomination of felony, (4) that is, all offences which occasion a forfeiture of lands or goods, will have the same effect in rendering a witness incompetent; though it is obvious, that crimes are not always punished by the legislature in proportion to their guilt, and there may be more depravity in some frauds, which are not punishable as crimes, than in some kinds of felony. By the common law, a person convicted of petty larceny was not a competent witness, because the offence was felony, no less than grand larceny; (5) but by stat. 31 G. 3, c. 35, it was enacted, that no person should be incompetent by reason of a conviction for petty larceny. (6)

Petit larceny.

Bribing a witness.

Some other offences also make a witness incompetent after conviction and judgment; as præmunire, barretry,(7) or the crime of bribing a witness to absent himself and not give evi-

(1) Gilb. Ev. 126. Bull. N. P. 291.

(2) Co. Lit 6 b. Hawk. b. 2, c. 46, s. 101. Com. Dig. tit. Testmoigne, A. 5. 2 H. P. C. 277. Fortesc. Rep. 209. Jones v. Mason, 2 Str. 833. Walker v. Kearney, 2 Str. 1148. Our earliest writers notice this cause of disqualification. The rule of the Roman law was the same; "Publico judico damnati, et non in integrum restituti, admittendi non suntad testimonii fidem." Dig. lib. 22, tit. 5, de Testibus, art. 3. s 5.

(3) See the judgment of Sir W. Scott in the case of Ville de Varsovie and others, 2 Dodson's Adm. Rep. 174.

(4) Co. Lit. 6 b. Com. Dig. ubi. sup.

(5) 2 H. P. C. 277. Pendock v. Mackinder, Willes' Rep. 667; where the authorities on this point are collected.

(6) See also 7 & 8 G. 4, c. 29, s. 2.

(7) R. v. Ford, 2 Salk. 690. Bull. N. P. 292. See Com. Dig. tit. Test moigne, A. 5.

dence.(1) A witness is disqualified by attaint of conspiracy at the suit of the king (2), that is, of a conspiracy to accuse another person of a capital offence (3); for then he is to have the villanous judgment, and lose the freedom of the law. It is otherwise, says Lord Hale, where he is attainted of a conspiracy at the suit of the party. (4) In a late case in the Admiralty court, which underwent much discussion, Sir W. Scott determined, on great consideration, that a conviction for a conspiracy to commit a fraud would not render an affidavit of the convict inadmissible (5); and a conviction for keeping a public gaming house has been thought not sufficient to render a witness incompetent. (6) It seems, that a person, who has been convicted of winning by fraud or ill practice in certain games, would not be a competent witness, since the stat. 9 Ann. c. 14, s. 5, not only inflicts a penalty, but also enacts, that he shall be deemed infamous; and one of the legal consequences of infamy is incompetency to give evidence in a court of justice.(7)

Conspiracy.

Fraud.

As convicts in such offences cannot be witnesses, they cannot make affidavits to support a charge against others; but, to exculpate or defend themselves, their affidavits have been allowed (8); upon the same principle that the affirmations of Quakers are admitted in their defence on a criminal charge.

Outlawry, in a personal action is no ground of exception. (9) But judgment of outlawry for treason or felony, appearing on record by the sheriff's return of the exigent, has the same effect as judgment after a verdict or confession (10); it follows, therefore, that such an outlaw cannot be a competent witness. (11)

Outlawry.

(1) Adjudged in Clancey's case, by seven judges; Holt C. J. doubting at first. Fortesc. Rep. 208. Bushell *v.* Barrett, 1 Ry. Mo. 434.

(2) Co. Lit. 6, b. 11 Rep. 99, a. 2 H. P. C. 277. Hawk. P. C. b. 1, c. 72, s. 9. Com. Dig. tit. Testmoigne A. 5.

(3) 2 H. P. C. 277. Hawk. ib. See R. v. Croseley, 2 Leach, Cr. C. 496.

(4) 2 H. P. C. 277. Saville v. Roberts, Carth. 416. Hawk. ubi. sup.

(5) In the case of Ville de Varsovie and others, 2 Donson's Adm. R. 174. Crowther *v.* Hopwood, 3 Stark. N. P. C. 21.

(6) R. v. Grant, 1 Ry. Mo. N. P. C. 270., by Abbott C. J.

(7) Co. Lit. 6, b. Fortesc. 208.

(8) Davis and Carter's case, 2 Salk. 461. Charlesworth's case, cited by the Court in Walker *v.* Kearney, 2 Str. 1148.

(9) Co. Lit 6, b. Com. Dig. tit. Testm. A. 5. Hawk. P. C. b. 1, c. 72. s. 107.

(10) 3 Inst. 212. Hawk. P. C. b. 2. c. 48, s. 22.

(11) Celier's case, Sir T. Raym. 369.

Infamous punishment.

Some kinds of punishment were formerly thought to be marks of infamy, and therefore witnesses were frequently rejected after branding, or after standing in the pillory; these being the usual punishments for the *crimen falsi*. (1) But the distinction is obvious, and now clearly settled, that it is not the punishment, but the nature of the offence, which causes infamy. (2) The maxim is, ex delicto non ex supplicio emergit infamia. Thus, it is no objection against the competence of a witness, that he has been in the pillory for a libel on the government, or for a trespass, or a riot. (3) He is not incompetent, unless he has suffered for the *crimen falsi*, as for perjury, &c.; in which case it is the crime, not the punishment, that incapacitates. And, on the other hand, after judgment for the latter kind of offence, he is not competent, though the punishment may have been only a fine. (4) (*a*)

Proof of judgment.

Infamy, arising from the sentence of a court of justice, must be established by regular proof of a conviction and judgment in the due course of law. The rule most commonly laid down is, that a *conviction* makes the witness incompetent. But it is not to be understood, that conviction alone incapacitates; for the conviction may possibly have been quashed, on a motion in arrest of judgment. (5) The judgment, therefore, as well as the conviction, must be proved; and the general rule is, that the judgment can only be proved by the record or by a copy of the record. (6) Even an admission by the witness himself, of his being in prison under judgment for grand larceny, (7) or of his having been guilty of perjury on another occasion, (8)

(1) 2 H. P. C. 277. Co. Lit. 6, *b*. 2 Dodson's Adm. Rep. 187.

(2) Gilb. Ev. 127. Bull. N. P. 292. R. v. Davis, 5 Mod. 75. R. v. Ford, 2 Salk. 690. Pendock v. Mackinder, 2 Wils. 18. Willes, Rep. 666. S. C. Fortesc. Rep. 209. Prindle's case, 2 Leach, Cr. C. 496.

(3) Chater v. Hawkins, 3 Lev. 426. Com. Dig. tit. Testm. A. 5. Gilb. Ev. 127. Fortesc. Rep. 209. In such cases punishment by the pillory is now abolished. See st. 56. G. 3, c. 138. But this statute does not make any alteration in the punishment of perjury, or of subornation of perjury.

(4) R. v. Ford, 2 Salk. 690. Bull. N. P. 292. Crosby's case, 10 St. Tr. 42, Appx. fol. ed. S. C. 2 Howell's St. Tr. 820.

(5) Lee v. Gansel, Cowp. 8. Gilb. Ev. 129. Com. Dig. tit. Testm. A. 5 Sutton v. Bishop, 4 Burr. 2283.

(6) Com. Dig. Ib. 8 East, 78.

(7) R. *v.* Castel Careinion, 8 East, 78.

(8) R. *v.* Teale, 11 East, 309. Rands v. Thomas, 5 Maule & Selw. 246.

(*a*) See Note 58, p. 64.

will not make him incompetent, however it may affect his credit.(*a*)

If the objection to the competency of a witness is founded on criminal proceedings instituted in any other court, these proceedings must appear on their face to be regular, and be regularly proved. A document, purporting to be an indictment and conviction, is imperfect as a record, without a caption; since the caption shows by what authority the indictment was found.(1) And the indictment must state all circumstances essential to constitute the offence.(1)

Reversal of judgment.

The party, who objects to a witness as attainted, will have to prove the attainder by proceedings in the regular course of law; and the opposite party may produce other proceedings in answer to the objection. If a conviction and judgment are read on the one side, this may be answered on the other by reading a reversal of the judgment upon a writ of error. If the incapacity arises from outlawry under a charge of treason or felony, it will be removed by proof of the reversal of that outlawry. Or if the objection is, that the witness has been attainted by an act of parliament, which subjects him to all the penalties of an attainder unless he surrenders before a certain day, (which is a kind of parliamentary outlawry,) it may be shewn, that the witness surrendered conformably with the act. Such an objection and such an answer occurred on the trial of Lord Lovat; (2) and in that case the record of a proceeding, commenced on the part of the crown, and defended on the part of the witness by a plea of surrender, which the Attorney General confessed to be true, was allowed to be conclusive proof of the fact of his surrender within the limited time.

Competency how restored.

A person convicted of felony being thus disabled from giving evidence, it remains to be considered, by what means the disability may be removed.

1. Purgation.

1. In ancient times, this was affected in many cases by a pro-

(1) Cooke v. Maxwell, 2 Starke, N. P. C. 184.

(2) 9 St. Tr. 652, 665, fol. ed. S. C. 18 Howell's St. Tr. 1004, 1011.

(*a*) See Note 59, p. 65.

ceeding then in use, called purgation,(1) by which all persons entitled to the benefit of clergy, were allowed to clear themselves before the ordinary, even after a conviction in the temporal courts. If on this canonical trial the party failed, which seldom happened, he was sentenced to remain in the ordinary's prison; and, on the other hand, upon his acquittal, he was pronounced innocent, absolved from infamy, and discharged from the punishment, incapacity, and discredit incident to the felony. Thus, formerly, allowance of the privilege of clergy, followed by purgation, would restore the competency of a witness.

2. Benefit of clergy.

2. It was afterwards found necessary to abolish this mode of trial by purgation; and therefore the stat. 18 Eliz. c. 7, s. 3, enacted, that persons admitted to the benefit of clergy should no longer be delivered to the ordinary for purgation; but, "after the clergy allowed and burning in the hand, should forthwith be enlarged and delivered out of prison." In the construction of this statute the judges held, that, as the old mode of purgation was thus taken away, the burning in the hand should be considered, as having the same effect in clearing away the disabilities of conviction.(2) "It was never the intent of the statute," said Lord Chief Justice Treby, in Lord Warwick's case, "merely to set at large and leave him a convict-felon; but when is said 'delivered,' it meant delivered free from all incident and further penalties, as if delivered upon purgation."(3) Hence the burning in the hand was considered in the nature of a statute-pardon.(4)

Proof of clergy.

It appears to be established by several cases, that proof of the record, whereby clergy was granted, without further proof of the burning in the hand, was not sufficient:(5) the words of the statute being, that he should be "delivered after clergy allowed and

(1) Treby C. J. in Lord Warwick's case, 5 St. Tr. 172, fol. ed. 13 Howell's St. Tr. 1017. S. C. Hob. 288. Kelyng, 37.

(2) Heston's case, cited in Foxley's case, 5 Rep. 110. Searle v. Williams, Hob. Rep. 292. Celier's case, Sir T. Raym. 369. Lord Castlemain's case, ib. 380. Kelyng, 37.

(3) Lord Warwick's case, 5 St. Tr. 172, fol. ed. S. C. 13 Howell's St. Tr. 1017.

(4) Hob. 292. Bull. N. P. 292.

(5) Searle v. Williams, Hob. 288. Armstrong and Lisle, Kel. 93. Lord Warwick's case, 5 St. Tr. 166, fol. ed. 13 Howell's St. Tr. 1003, S. C.

burning in the hand." This, therefore, is necessary to be proved, except in those cases where the benefit of clergy may be allowed without branding, as to a clerk in holy orders or peer of parliament or where the branding is excused by pardon, or commuted for another punishment (as a fine,) and then it must be shown, that the witness has suffered such substituted punishment instead of the other. (1) In Lord Warwick's case, above cited, one who had been convicted of manslaughter and allowed his clergy, but not burnt in the hand, was called as a witness for the prisoner; and, on an objection to his competency, the lords referred it to the judges present, who thought he was not a competent witness, as the statute had made the burning in the hand a condition precedent to the discharge. (2)

3. In cases where, instead of this burning in the hand, some other punishment has been substituted by act of parliament, (as transportation, by st. 4 G. 1, c. 11, (3) or a fine or whipping by st. 19 G. 3, c. 74, s. 3, (4) felons, within the benefit of clergy, are made competent after suffering such substituted punishment: these statutes expressly providing, that it shall operate as a pardon, and completely remove all incapacities. (*s*)

3. Effect of suffering punishment.

4. A person convicted of grand larceny and sentenced to transportation for seven years, who has been confined in the hulks, and

Under sentence of transportation.

(1) Burridges's case, 3 3 P. Wms. 485, 490.

(2) See Infra p. 33, on substitution of punishment for burning in the hand.

(3) The first section of this statute enacts, that on the conviction of any person for grand or petit larceny, *where the convict is entitled to benefit of clergy,* and liable only to the penalties of burning in the hand or whipping (except persons convicted for receiving or buying stolen goods, knowing them to be stolen,) the court before whom the person is convicted, instead of ordering the offender to be burnt in the hand or whipped, may direct, that he shall be transported for the space of seven years; and on the conviction of an offender for a crime, for which he would be excluded from the benefit of clergy, but to whom mercy is extended on condition of transportation, the court may allow him the benefit of a pardon under the great seal. And, by the second section of the same act, where any such offenders shall be transported, and shall have served their respective terms, according to the order of any such court, such services shall to all intents and purposes have the effect of a pardon, as for the crime for which they were so transported.

(4) The st. 19 G. 3, c. 74, enacts, that in case of a conviction of any felony within the benefit of clergy, for which the offender is liable to be burned in the hand, the court may impose a moderate pecuniary fine instead of the burning, or may order the offender (except in case of man-slaughter) to be publicly or privately whipped: and that such fine or whipping shall have the same effect as the burning, in discharging from felonies or restoring to credit.

(*s*) See Note 60. p. 65.

discharged at the expiration of the seven years, is a competent witness; such confinement and discharge operating as a statute pardon.(1)(*t*)

Under sentence of imprisonment.

A witness who has been imprisoned under sentence of imprisonment for grand larceny, but which sentence omitted to order either burning in the hand, whipping or fine, is not restored to competency, though he suffer the whole imprisonment.(2)(*u*).

Peers of parliament,(3) and all clergymen, were entitled to benefit of clergy, and therefore competent witnesses, without burning in the hand, and consequently without any punishment in its stead.

Benefit of clergy abolished.

But the benefit of clergy, with respect to persons convicted of felony, is now abolished, by a recent statute.(4) Consequently, the commuted punishments of transportation, fine, or whipping, *in lieu of burning in the hand*, are abolished. And this alteration will be found, in many cases, to have an inconvenient effect on the general rule as to the competency of witnesses.

Petty larceny.

As the privilege of clergy, at common law, extended only to capital felonies, and not to petty larcenies or misdemeanors, persons convicted of petty larceny could not be discharged under st. 18 Eliz. c. 7, s. 3, which relates only to such as were allowed their clergy; nor were they included in stat. 19 G. 3, c. 74, s. 3, which gives a discretionary power to substitute a moderate fine or whipping for burning in the hand; (5) so that convicts in petty larceny, though they had suffered the sentence of the law, were still incompetent to give evidence, while in many cases convicts in grand larceny were admissible. This inconsistency was removed by a statute of the present reign, which has been already mentioned. (6)

(1) Badcock's case, Russ. & Ry. Cr. C. 248. The witness, while in the hulks, escaped twice, and was brought back again each time within twenty-four hours; the judges held, that this circumstance did not destroy the effect of the statute-pardon, as he had served out the remainder of his term.

(2) Harding's case, 1 Ry. Mo. Cr. Ca. 39.

(3) St. 1 Ed. 6, c. 12, s. 4.

(4) 7 & 8 G. 4, c. 28, s. 6.

(5) St. 4 & 5 H. 7, c. 13.

(6) St 31 G. 3, c. 35, and 36 G. 3, c. 29, Irish stat. See also 7 & 8 G. 4, c. 29, s. 2. The St. 31 G. 3, c. 5, recites, that persons convicted of grand larceny are by their punishment restored to their credit as witnesses.

(*t*) See Note 61, p. 65. (*u*) See Note 62, p. 66.

4. Pardon under great seal.

4. The competency of a witness may be restored by a pardon from the Crown, under the great seal. Some indeed have thought, that a pardon can only remove the punishment, not the blemish of character.(1) But it is now settled, that a pardon of treason or felony, even after conviction or attainder, not only takes off every part of the punishment, but also clears the party from the legal disabilities of infamy, and all other consequences of his crime.(2)* A pardon is said to make the witness a new creature, and gives him a new capacity: the crime, indeed, may still be objected against him, as affecting his credit, but cannot be urged against his competency as a witness.(*v*) It is indeed highly expedient, that a pardon should be allowed to have this effect, and that a discretionary power should be vested in the crown to remove such legal incapacities: otherwise, a person, once convicted of felony, would be stigmatised for life, and treated as infamous in courts of law, though in the opinion of mankind his character for truth and honesty may have been completely redeemed.(*w*)

In misdemeanors.

Perjury.

As in the greater offences, so in those below felony, (as perjury at common law, &c.,) a pardon will restore competency, where the disability is a consequence of the judgment.(3) But where the disability is declared by act of parliament to be part of the punishment, as in the case of a conviction for perjury or subornation of perjury on the stat. 5 Eliz. c. 9, the king's pardon will not make the witness competent.(3)(*x*) In this case the statute expressly provides, that he shall never be admitted to give evidence in courts of justice, until the judgment be reversed.

(1) Lord Coke in Brown v. Crashaw, 2 Bulstr. 154. Dodridge J. in Harris v. Whyte, Palm. 412. Latch. 81; and other dicta cited in Hargrave, Jurid. Arg. vol ii. p 263

(2) Cuddington v. Wilkins, Hob. 67, 82. Rookwood's case. Rep. temp. Holt, 685. 4 St. Tr. 682. fol. ed. S. C. 13 Howell's St. Tr. 185. Crosby's case, Lord Raym. 39 Lord Castlemain's case, Sir T. Ray, 379. 2 H. P. C. 278. Hawk. P. C. b. 2, c. 37. s. 48. Com. Dig. Testm. A 5. Reilly's case, Leach Cr. C. 510. Lord Warwick's case, 5 St. Tr. 166, fol. ed. 13 Howell's St. Tr. 1003, S. C.

(3) 2 H. P. C. 278. R. v. Greepe, 2 Salk. 514. 1 Ld. Raym. 256, S. C. R. v Ford, 2 Salk. 690. Crosby's case, 2 Salk. 689. Bull. N. P. 292. Hawk. b. 2, c. 46, s. 112. R. v. Warden of the Fleet, Rep. temp. Holt, 135. Anonym. case, 3 Salk. 155.

* The king's perogative has the same effect in Scotland in restoring the competency of a conviet See Burnet's History of the Criminal Law of Scotland, p. 405, and the report there of the case of Bell and Mortimer in 1800, in which the rule was fully established.

(*v*) See Note 63, p. 66. (*w*) See Note 64, p. 66. (*x*) See Note 65, p. 66.

Conditional.

If the pardon is conditional, the performance of the condition ought to be shown; (1) for on that depends all its efficacy. Thus, where pardon is on condition of transportation for a number of years, the witness is not competent before the expiration of the term or other lawful determination. (2)(*y*)

Pardon under sign manual.

Where a warrant is granted under the sign manual, countersigned by a principal secretary of state, for a free or conditional pardon of a person convicted of felony, his discharge from custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, will now have the effect of a pardon under the great seal, as to the felony for which the pardon is granted. (3)

Sect II.

Of the Admissibility of Accomplices.

General rule.

It has been before mentioned, that a witness is not incompetent from infamy of character, unless a conviction and judgment are proved, though he may confess himself guilty of an infamous crime. Nor is it a sufficient objection to his competency, that he has been an accomplice in guilt with the prisoner at the bar.

Accomplices.

The evidence of accomplices has been at all times admitted, (4) from a principle of public policy and from necessity, as it is scarcely possible to detect conspiracies and many of the worst crimes without their information. In the case of Charnock, (5) who was tried for high treason in the time of William III, Lord Holt said, in his address to the jury, "Conspiracies are deeds of darkness as well as of wickedness, the discovery whereof can properly come only from the conspirators themselves; and the evidence of accomplices has always been allowed good proof

(1) Hawk. b 2, c. 37, s. 45.

(2) Hawk. b. 2, c. 37, s. 45. Burridge's case, 3 P. Wms. 485. See Badcock's case, supra p. 34.

(3) St. 7 & 8 G. 4, c. 28. s. 13.

(4) 1 H. P. C. 303. Hawk. b. 2, c. 46, s. 94. Gilb. Ev. 123. Charnock's case, 4 St. Tr. 594. 12 Howell's St. Tr 1453, S. C. Rookwood's case, 4 St. Tr. 663. 12 Howell's St. Tr. 143, S. C. Attwood's case, cited by Grose, J. 7 T. R. 609. Westbeer's case, Leach, Cr. C. 14. Despard's case, 28 Howell's St. Tr. 488. And see on this subject the report of the proceedings under a special commission at York, in 1813, pp. 17, 150.

(5) 4 St. Tr. 594. S. C. 12 Howell's St. Tr. 1454, referred to by Lord Ellenborough in Despard's case, 28 Howell's St. Tr. 488.

(*y*) See Note 66, p. 66.

in all ages; and they are most proper witnesses, for otherwise it is hardly possible, if not altogether impossible, to have a full proof of such secret contrivances;" and he adds, "such discoveries are to be encouraged in all governments, without which there can be no safety." But though accomplices are received as witnesses, their testimony ought to be received by a jury with a sober degree of jealousy and caution; for, on their own confession, they stand contaminated with guilt, and, in the hope of lessening their own infamy, will often be tempted to throw as much guilt as possible upon the prisoner. They may be also in some cases entitled to rewards on the prisoner's conviction, and in all cases expect to earn a pardon; and as fear is usually their motive in giving evidence, the same feeling may tempt them to exaggerate their statement, for the purpose of destroying their former associate, and securing themselves against his vengeance. (1) (z)

Approvement.

The practice of admitting accomplices to give evidence against their associates has been adopted from analogy to the ancient doctrine of approvement; a part of the old law, which, though now grown obsolete, may properly be mentioned here, from its affinity to the more improved modern usage substituted in its place. (2) Approvement is when a prisoner, arraigned on a capital charge, confesses the fact before plea pleaded, and accuses his accomplices of the same offence. He must also discover upon oath, not only the particular crime charged upon him, but all treasons and felonies, of which he can give any information. It is then in the discretion of the Court either to refuse or admit him to be an approver: and if on his confession it appears, that he was a principal and tempted the others, he ought not to be received. But if he does not discover the whole truth, or, on the trial of the appeal, the party accused should be acquitted, judgment of death passes against him upon his own confession of the indictment.

(1) On the subject of the *credibility* of accomplices, considered with reference to the nature of the particular offence in which they have been concerned, the reader is referred to some excellent observations made by the Lord Chief Justice of the Court of K. B. in Ireland, in the trial of Forbes, Graham, and others, for a conspiracy, 1823. Printed Rep. p. 355.

(2) Rudd's case, Cowp. 335.

(z) See Note 67, p. 67.

This practice of allowing approvements, which was at all times in the discretion of the Court, is now grown into disuse, and entirely discontinued; more mischief having arisen from false accusations under pretence of approving, than benefit to the public by the discovery and conviction of real offenders. (1) Whatever good was to be expected from this old method, is now more effectually provided for and secured by one of the following methods:—First, there are several acts of parliament which enact, in cases of robbery, (2) coining, (3) burglary, (4) housebreaking, (4) horse-stealing, (4) privately stealing to the value of five shillings from shops, warehouses, stables and coach-houses, (4) or uttering counterfeit money, (5) that, if any such offender, being out of prison, shall discover two or more persons, who have committed the like offences, he shall be entitled to pardon for such crime, on their conviction. Another method is by special proclamations in the Gazette or otherwise, promising pardon on certain conditions.

Implied compact with accomplices.

But the practice most generally adopted is that of admitting accomplices to give evidence for the crown, under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth. (6) On a strict and ample performance of this condition, to the satisfaction of the judge presiding at the trial, they have an equitable title to a recommendation for the king's mercy. They cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial, in order to give the prisoner time to make an application in another quarter. (7) (*a*)

This equitable claim to pardon does not protect an accomplice from prosecutions for other offences, in which he was not concerned with the prisoner. (8) With respect to such offences, therefore, he is not bound to answer on his cross-examination. (9) (*b*)

(1) 2 Hale, P. C. 227, ch. 29.
(2) St. 4 W. & M. c. 8, s. 7.
(3) St. 6 W. 3, c. 17, s. 12.
(4) St. 10 W. 3, c. 25, s. 5. St. 5 Ann. c. 31, s. 4.
(5) St. 15 Geo. 2, c. 28, s. 4.
(6) Rudd's case, Cowp. 339.
(7) Cowp. Rep. 339.
(8) Lee's case, Russ. Ry. Cr. C. 361. Brunton's case, Russ. Ry. Cr. C. 454.
(9) West's case, O. B. sess. after Easter term, 1821.

(*a*) See Note 68, p. 68. (*b*) See Note 69, p. 68.

Compact broken.

If an accomplice, after having confessed the crime, and after being received as a witness against his companions, breaks the condition on which he is admitted, and refuses to give full and fair information, the Court may direct a bill to be presented forthwith to the grand jury against him, or, if they are discharged, may commit him to prison upon his own written confession. (*c*)

Motion to admit accomplice.

It is not a matter of course, to admit a person, charged with the commission of a crime, as witness on the trial of his accomplices, not even after he has been so allowed by the committing magistrate; but if his evidence is wanted before the grand jury, and absolutely necessary for the finding of the bill, a motion, for the purpose of his attendance, must be made by the counsel for the prosecution, and the Court, under all the circumstances of the case, will either grant or refuse an order, as may most effectually answer the purpose of justice. (*d*)

Accomplices when competent.

The general rule then is, that a person who confesses himself guilty of a crime, is a competent witness against his partners in guilt. If two or more persons are charged with a crime, one who is not indicted may be a witness against the others, though he has had a promise of pardon or some reward on condition of giving evidence. (1)

Separately indicted.

If he is indicted separately, he is a competent witness, either on the part of the prosecution, or on behalf of the prisoner on trial; (2) even after conviction, he is not incompetent, unless judgment has passed; for it is not the conviction, but the judgment that creates the disability. It was formerly thought, from analogy to the ancient doctrine of approvement, that an accomplice, separately indicted for the same offence, could not give evidence against the others, unless he had first pleaded guilty to the indictment against him; (3) but the rule is now settled as above stated.

(1) Tonge's Case, Kel. 17. 1 H. P. C. 303, S. C. Layer's case, 10 St. Tr. 259. 19 Howell's St. Tr. 375, S. C. Hawk. P. C. b. 2, c. 46, S. 135.

(2) Case of Bilmore and others, 2 H P. C. 279. 1 H. P. C. 305. Gunston and Downes, 2 Roll. Abr. 685, pl. 3. Hawk. b. 2, c, 46, s. 99. Gilb. Ev. 118. Bath v. Montague, cited Fortesc. Rep. 247.

(3) Sir P. Cresby's case, 1 H. P. C. 303.

(*c*) See Note 70, p. 68. (*d*) See Note 71, p. 68.

If the evidence of an accomplice is deemed to be absolutely necessary in support of a prosecution, the proper course is that beforementioned, to apply to the Court for permission to send him as a witness before the grand jury. And should this course be adopted, it will be more convenient not to include him in the bill. But if he is indicted together with the rest, and his evidence is thought to be indispensably necessary, he may still be used as a witness, in some cases, with the consent of the Court. Thus, if he plead guilty, and by the judgment of the Court is fined, pays the fine, (in a case, where such fine may be imposed, and where the suffering of this substituted punishment restores competency,) he may be a witness against the others. In a prosecution for a conspiracy, a verdict of acquittal may be taken for some of the defendants, before the opening of the case against the rest, and the defendants, so acquitted, may be called as witnesses. (1) And there appears to be no objection in point of law, in the case of felony also, (if the Court approve of the course,) to allow a verdict of acquittal to be taken as to one of the persons indicted, for the purpose of using his evidence against the others.

Jointly indicted.

Pleading guilty and fined.

Acquitted to be used as witness.

As on the trial of one of several persons, who are separately indicted, another of the persons indicted, who has not yet been tried; is a competent witness in support of the prosecution; so he is equally competent to give evidence on behalf of the accused. (*e*)

Principal felon.

On the trial of an accessary, for a misdemeanor in receiving stolen goods, under stat. 22 G. 3, c. 58, the principal felon is a competent witness; the statute enacting, that the accessary may be proceeded against, although the principal felon has not been convicted, and whether he be or not amenable to justice. (2) So the principal felon may be a witness, in a prosecution on stat. 4 G. 1, c. 11. for taking a reward to help to stolen goods. (3) (*f*)

The evidence of accomplices is also admitted on the trial of

(1) R. v. Rowland and others, 1 Ry. & Mo. 402.
(2) Haslam's case, 1 Leach, Cr. C. 467. Price's case, ib. 468, n. (1) Patram's case, 2 East, P. C. 782.
(3) Wild's case, 2 East, P. C. 782.

(*e*) See Note 72, p. 69. (*f*) See Note 73, p. 69.

smaller offences. In an information under stat. 2. G. 2, c. 24, for bribery at an election, a person, who has received a bribe, may be a witness against the defendant, though in case of a conviction he would be indemnified from the penalties of the act.(1)(*g*) Accomplices, in information, &c.

In an action of trespass, a co-trespasser, who is not sued, may be a witness against the defendant, though left out of the declaration for that purpose, and although satisfaction from one is a discharge for all the rest. (2)(*h*) A person, who has set his name as subscribing witness to a deed or will, is admissible to impeach the execution of the instrument, (3)(*i*) although his evidence is to be received with all the jealousy necessary attaching to a witness, who upon his oath asserts to be false, what he has by his solemn act attested as true. (4) Co-trespasser. Attesting witness.

Since accomplices are competent witnesses, it necessarily follows, that, if their evidence is believed by a jury, a prisoner may, strictly speaking, be legally convicted upon it, though it be unconfirmed by any other evidence as to his identity. (5) But their testimony alone is seldom of sufficient weight with a jury to induce them to give a verdict against the prisoner; the temptation to commit perjury being so great, where the witness by accusing another may escape himself. (6) The practice, therefore, is, to advise the jury to regard the evidence of an accomplice, only so far as he may be confirmed, in some material part of his narrative, by unimpeachable testimony. It is not necessary that it should be confirmed in every circumstance which he details in evidence: for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion. Nor need it appear from the confirmatory evidence, that he speaks truth with respect to all the prisoners, or with respect to the share which Confirmatory evidence. Confirmation as to one.

(1) Bush *v.* Ralling, Sav. 289, cited by Lord Mansfield, Cowp. 199. Snead v. Robinson, Willes, 423, and n. (*c*) ib. 425.

(2) Bull. N. P. 286. Luttrel *v.* Reynel, 1 Mod. 283. Chapman v. Graves and others, 2 Camp. b. N. P. C. 333, n.

(3) Lowe *v.* Joliffe, 1 Black. Rep. 365. 7 T. R. 604, 611. 6 East, 195.

(4) 1 Ves. & Beam. 208.

(5) Atwood's case, 2 Leach, Cr. C. 521. Durham's case, ib. 538. By Ld. Ellenborough, C. J. in R. *v.* Jones, 2 Campb. N. P. C. 133. 31 Howell's St. Tr. 315, 325, S. C. 7 T. R. 609, S. P.

(6) By Lord Mansfield C. J. Cowp. Rep. 336.

(*g*) See Note 74, p. 70. (*h*) See Note 75, p. 70. (*i*) See Note 76, p. 70.

each had in the transaction. But if the jury are satisfied, that he speaks truth in some material parts of his testimony, in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe, that he also speaks truly in other parts, and with regard to other prisoners, as to whom there may be no confirmation. (1)

The confirmation, here intended, is not a confirmation merely of those parts of the narrative which implicate the accomplice alone, and which may be true without involving the prisoners in any share of the transaction; but such a corroboration by unimpeached evidence, as may satisfy the jury that those persons, whom he charges with a participation of the crime, were, in truth, as he represents, his confederates and associates in guilt. The principle, upon which courts and juries are disposed to give credit to an accomplice, however base his conduct, when he is confirmed by clear and unimpeachable evidence, is well warranted on this consideration, that witnesses, who agree in the main facts of a case, without concert and without contrivance, acquire a credit, entirely independent of character, from the mere agreement and consistency of their narative. (*j*)

Informers. There is another class of persons, which cannot properly be considered as coming within the description, or as partaking of the criminal contamination of accomplices; persons, entering into communication with conspirators, with an original purpose of discovering their secret designs, and disclosing them for the benefit of the public. (2) The existence of such original purpose on their part is best evinced by a conduct, which precludes them from ever wavering in or swerving from the discharge of their duty, if they might otherwise be disposed so to do; as when the witness binds himself to his duty by an early communication, and receives directions as to the steps which he is after-

(1) Report of the Trials at York, Jan. 1813, on special commission, p. 3, 17, 50, 150, 165, 201. Despard's case, 28 Howell's St. Tr. 488; and the case cited by Lord Ellenborough C. J. in his summing up, on the trial of Valentine Jones, 31 Howell's St. Tr. 325. Dawbar's case, 3 Stark. N. P. C. 31. Brikett's Case. Russ. & Ry. Cr. C. 252. Case of Fordham, Harvey, and two others, tried by Lawrence, J. at O. B. Jan. 1807, before the Judges, 25th April 1807, H. MS.

(2) Part of Lord Ellenborough's address to the jury in Despard's case, 28 Howell's St. Tr. 489.

(*j*) See Note 77, p. 71.

wards to pursue, on entering into the apparent prosecution of the purposes of the conspiracy. With this view and object, such a witness is not an accomplice, although perhaps a great degree of objection or disfavor may attach to him on other grounds, for certainly (however necessary it may be in some cases) no person of very delicate feelings would choose to go on from day to day, apparently forwarding the purposes of a conspiracy, in order that he might afterwards disclose it, and bring the parties concerned in it to justice; but still, whatever may be the merit or demerit of this species of conduct on other grounds, such a witness is not, strictly speaking, an accomplice. (1).

The cases which have been mentioned, respecting the evidence of accomplices, and on the admissibility of persons to prove the forgery of any instrument, which they have signed as subscribing witnesses clearly show that a man's guilt in the transactions disclosed is not a sufficient reason for rejecting his testimony, however it may affect his credibility. (2) In the case of Walton *v.* Shelley, (3) indeed, which was an action upon a bond, given by the defendant in consideration of the plaintiff's delivering up certain promissory notes, the Court of King's Bench held, that the indorser of one of the notes ought not to be allowed to prove the consideration of the note usurious, on a supposed principle of public policy, that no party who has signed a paper or deed, and by his signature given it credit, shall ever be permitted to give testimony to invalidate that instrument. This appears to have been the first case in support of such a rule, and the contrary seems now to be fully established.

Witness invalidating an instrument.

Indorser.

In the later case of Jordaine v. Lashbrooke, (4) this subject was very fully discussed; and the Court there determined, that in an action on a bill of exchange against the acceptor, the payee, who was also endorser, was a competent witness for the defendant, to prove, that the bill, which was unstamped, and purported to be drawn at Hamburgh, was, in fact, drawn in London, and

Payee.

(1) Part of the same address, 28 Howell's St. Tr. 489.

(2) Ante p. 41. See also R. v. Teale, ante, p. 30.

(3) 1 T. R. 296. "Testes qui adversus fidem suam testationis vacillant, audiendi non sunt"—was the maxim of the civil law. Domat, book 3, tit. 6, sect. 3, art. 12.

(4) 7 T. R. 601. Ashurst J. contra. See Jones v. Brooke, 4 Taunt. 464. 1 Ves. & Beam. 208.

therefore void for the want of a stamp. "The constant practice of examining accomplices, (said Mr. Justice Lawrence, in delivering his opinion,) and the case of a witness to a forged will who has obtained probate, show, that the mere circumstance of a man's representing himself as having done things inconsistent with common honesty, is not sufficient to reject his testimony, however it may weaken and impeach it. (1) Nor is there any distinction with respect to negotiable securities, where the point to be considered is the competency of the witness; for supposing what he has done in putting such instrument into circulation to be ever so great a fraud and ever so mischievous, he is still a witness unconvicted of any crime, and without interest, and not more devoid of principle than many who have been mentioned as constantly admitted." (2) (*k*).

In an action of assumpsit for goods furnished to a ship, it was proved on the part of the plaintiff, that the defendant's name was in the register as joint owner with another person, on whose oath the register was obtained; and that after the time of furnishing the goods, the defendant executed to him a conveyance of the share, which he appeared from the register to have; the Court of King's Bench held, that this person was a competent witness, on the part of the defendant, to prove that he had inserted the defendant's name without his privity and consent, and that the conveyance was executed in order to divest him of all alleged interest. (3) In this case, it is to be observed, there was not any ground of charging the defendant with the amount of the goods, except in virtue of the supposed interest, which the register represented him to have in the ship; and under such circumstances, it was competent to him to show that the property never belonged to him.

(1) 7 T. R. 610.

(2) 7 T. R. 611. By this case of Jordaine *v.* Lashbrooke, the case of Adams *v.* Lingard, 1 Peake N. P. C. 117, and some other cases of the same kind are overruled.

(3) Rands *v.* Thomas, 5 Maule & Sel. 246.

(*k*) See Note 78, p. 71.

CHAPTER V.

Of the Incompetency of Witnesses from Interest.

THE fourth ground of incompetency is interest. (*l*)

General rule.

It is a general rule, that all witnesses, interested in the event of a cause, are to be excluded from giving evidence in favour of that party, to which their interest inclines them. They are excluded from a presumed want of integrity or impartiality; and not, as some have concluded, that they may be saved from the temptation to commit perjury. If that were the true principle, there would be some inconsistency in excluding witnesses, who have an interest even to the smallest amount, at the same time that others are admitted who may be subject to the more powerful influence of relationship, friendship or feeling. "Where a man," says Chief Baron Gilbert, "who is interested in the matter in question, comes to prove it, it is rather a ground for distrust than any just cause of belief; for men are generally so short-sighted, as to look at their own private benefit, which is near to them, rather than to the good of the world, that is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biassed testimony, than to believe it."

In treating of the incompetency of interested witnesses, it is proposed to consider the subject in the following order:—

First, with respect to the nature of the interest, which will disqualify;

Secondly, of the rule on the subject of interest, considered with reference to the parties in the suit;

Thirdly, of the same rule considered with reference to the husband or wife of the party;

Fourthly, of the effect of admissions by a party to the suit, or by his agent, against the party's interest;

(*l*) See Note 79, p. 81,

Fifthly, of the admissibility of the confession of a prisoner against himself;

Sixthly, of the competency of the party injured, as witness in criminal prosecutions;

Seventhly, of certain exceptions to the general rule on the subject of interest; and,

Lastly, of the means by which the competency of an interested witness may be restored.

Sect. I.

Of the Nature of the Interest which disqualifies a Witness.

It is scarcely possible to reconcile the earlier cases on this subject with those of a more recent date. The old cases respecting the incompetency of witnesses were generally decided on very narrow grounds. Evidence, which ought to have been admitted, although received with caution, was at once excluded without being heard ; as if juries were not to be trusted with all the means of deciding right, because it was possible their decision might be wrong. "The old cases on the competency of witnesses," said Lord Mansfield, (1) "have gone upon very subtle grounds. But of late years the courts have endeavoured, as far as possible, consistently with those authorities, to let the objection go to the credit rather than to the competency of a witness."

At one time it was generally held, that, if a witness had no interest in the question put to him, he was incompetent. Thus it has been laid down in some of the earlier cases, as a general rule, that one commoner cannot be a witness for another commoner ; and that in an action on a policy of insurance one underwriter cannot be a witness for another. But a distinction has since been made between an interest in the question put to a witness, and an interest in the event of the suit ; (2) (*m*) and the

(1) Walton v. Shelley, 1 T. R. 300, cited by Lord Kenyon in Bent v. Baker, 3 T. R. 32. ; and see R. v. Bray, Cas. Temp. Hard. 360.

(2) 1 T. R. 302. 3 T. R. 36. 7 T. R. 603.

(*m*) See Note 80, p. 81.

general rule now established is, that a witness will not be disqualified on the ground of interest, unless he is interested in the event of the suit. (*n*)

The question then resolves itself into this, Whether the witness proposed to be examined, has an interest in the event of the suit? In considering this subject, the simplest method will be, to ascertain, in the first place, what is not such an interest in the event, as will disqualify a witness from giving evidence: and then to enquire, what is such an interest, as will disqualify him.

I. First, what is not such an interest, as will disqualify.

Wishes or expected benefit.

It is not an objection to the competency of a witness, that he has wishes or a strong bias on the subject-matter of the suit, or that he expects some benefit from the result of the trial. (*o*) Such circumstances may influence his mind, and affect his credibility; they are, therefore, always open to observation, and ought to be carefully weighed by the jury; who are to determine what dependence they can have on his testimony; but they will not render him incompetent. (*p*)

Witness in the same situation with the party.

Co-tresspasser.

A witness who stands in the same situation as the party, for whom he is called to give evidence, is under a strong bias, and may have strong wishes upon the subject: but is not on that account disqualified. (*q*) Thus if there are two actions brought against two persons for the same assault, in the action against one the other may be a witness; (1) or if several persons are separately indicted for perjury in swearing to the same fact, either of them before conviction may be a witness on the trial of the others. (2) So, in Rudd's case, a woman, whose husband had been before convicted, was admitted to give evidence against the prisoner, though she expected, that, in case of his conviction, her husband would receive a pardon. (3)

Wife of convict.

Underwriter in policy.

Upon the same principle, in the case of Bent v. Baker, which was an action against an underwriter on a policy of insurance,

(1) By Ashurst, J. 1 T. R. 301. 5 Barn. & Cress. 387.
(2) Bath v. Montague, cit. Fortesc. Rep. 247. Gunstone v. Downes. 2 Roll. Abr. 685. art. 3; S. C. cited 2 H. P. C. 280, and in R. v. Gray (or Bray,) 2 Selw. N. P. 1120.
(3) 1 Leach, Cr. C. 151.

(*n*) See Note 81, p. 81. (*o*) See Note 82, p. 84. (*p*) See Note 83, p. 85.
(*q*) See Note 84, p. 89.

the Court held, after much argument, that another underwriter was a competent witness. (1) This case came before the Court of King's Bench, by writ of error from the Court of Common Pleas; a writ of error was afterwards brought to reverse the judgment of that court, (2) but was at length abandoned. It has always been considered a case of great authority, and deserves to be particularly noticed, as it is one of the leading cases, which have established the rule of evidence on this subject. The principal question in that case was, whether a person, who had been employed as broker by the plaintiff in procuring the policy to be subscribed by the defendant, and had afterwards himself subscribed the policy as assurer, was a competent witness for the defendant. The Court adjudged that he was competent; Lord Kenyon C. J., Mr. Justice Buller, and Mr. Justice Grose held, that he ought not to have been rejected, on the broad and general ground, because he was not interested in the event; Mr. Justice Ashhurst, on a narrower ground, because the witness stood in the particular situation of broker; and, having made himself a party to the policy, he ought not to be allowed by his own act to deprive either party of the benefit of his testimony. The other judges also concurred in this opinion: but Lord Kenyon C. J. declared, that the reason before mentioned was the principal ground of his judgment. He said, "The objection is, that the witness was underwriter on the some policy. I must acknowledge, that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider, what are the principles and good sense to be extracted from them all. I think the principle is this: if the proceeding in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon that subject; for that only goes to his credit, and not to his competency."

Vendor.

The vendor of an estate, who has sold the inheritance without any covenant for good title or warranty, is competent to prove the title of the vendee. (3) (*r*) In an action of trover for a horse, a person who accepted the horse from the plaintiff as a security for the payment of a sum of money, and afterwards on default

(1) 3 T. R. 27. Bull. N. P. 283, S. P.

(2) 7 T. R. 604.

(3) Busby v. Greenslate, 1 Str. 445.

(*r*) See Note 85, p. 97.

sold it to the defendant, is competent on the part of the defendant to prove these facts. (1) So also the witness is competent to prove, that the goods, the subject-matter of the action, belonged to himself, and were obtained out of his possession fraudulently by the plaintiff; (2) for in neither case can the verdict be used by the witness, or against him. (*s*)

Dormant partner.

In an action on a contract, by which the defendant engaged to print for the plaintiff, on paper to be supplied by him, a certain number of copies of a work, and to cause the paper to be insured from fire, while it remained in his possession; one, who has purchased a number of copies from the plaintiff, but was not privy to the contract with the defendant, is a competent witness for the plaintiff, to prove the contract.*(3)

Sub-tenant. Reversioner. Captain of ship.

In an action of covenant for the mismanagement of a farm, the sub-lessee of the defendant is competent to prove its proper cultivation. (4) In an action by a reversioner for an injury done to the inheritance, his tenant in possession is competent to prove the injury done by the defendant. (5) In an action on a policy of insurance, where the only question is concerning the original destination, of the ship, the captain is competent to give evidence respecting that fact, though a part owner of the ship, and, as such, liable to the owners of the goods, in case the ship had unnecessarily deviated from the voyage; but, if the question turn on a deviation, he could not be examined. (6) In an action

(1) Nix v. Cutting, 4 Taunt. 18.
(2) Ward v. Wilkinson, 4 Barn. & Ald. 410. The only point presented to the court, in this case, related to the competency of the witness.
(3) Mawman v. Gillet, 2 Taunt. 325, n.
(4) Wishaw v. Barnes, 1 Campb. N. P. C. 341.
(5) Doddington v. Hudson, 1 Bing. 258. 8 Moore, 163, S C.
(6) De Symonds v. De La Cour, 2 New Rep. 374.

* The principle which the Lord Chief Justice Mansfield appears to have deduced from this case, and which was stated in a former edition of this work, seems to be this, that *a dormant partner, not being one of the contracting parties, and who has had no privity of communication with them in the contract, is competent to prove the contract.* But perhaps, on consideration, the case of Mawman v. Gillet, may be thought not to warrant such an extensive and general proposition. And since it has been determined in the case of Skinner *v.* Stocks, 4 Barn & Ald. 437, that an ostensible partner, who has made a contract, may join dormant partners with himself as co-plaintiffs, it seems to be justly observed, (in a new edition of Saund. Rep. 291, j. n. h.) that a dormant partner, who is interested as such in the contract, is not a competent witness for the plaintiff to prove the contract.

(*s*) See Note 86, p. 92.

for falsely representing the circumstances of a person who was insolvent, and thereby inducing the plaintiff to give him credit, that person is competent to prove his insolvency. (1) In these cases, the witness neither gains nor loses directly by the event of the verdict: nor would the verdict be evidence either for or against him.

Influence of verdict.

A witness is not incompetent on the ground, that the verdict may afterwards come to the knowledge of a jury in an action brought by the witness himself, and so have an influence on their judgment, though not in evidence before them. Lord Holt, indeed, in the case of the King v. Whiting, (2) on an indictment for a cheat in obtaining a person's subscription to a note of 100*l.* instead of 5*l.*, rejected the evidence of the maker of the note; on the ground, that the verdict would be certainly heard of, in an action on the note, to influence the jury. This decision was followed by Lord Hardwicke C. J. in the case of the King *v.* Nunez. (3) But afterwards, in the case of the King v. Bray, (4) Lord Hardwicke reviewed his own opinion and that of Lord Holt, and decided that the objection went only to the credit and not to the competency of the witness; and with respect to the possibility that the jury might hear of the verdict, he said, that, sitting as judge, he could only hear of it judicially.

Party injured in prosecution for perjury.

Upon the same principle, in the case of the King v. Boston, (5) where it appeared that A. had brought an action against B., (who filed a bill in equity for an injunction, and, after answer put in by A. denying the allegations in the bill, the injunction was dissolved,) and A. was afterwards indicted for perjury, alleged to have been committed in his answer, and the indictment came on to be tried immediately before the action; the Court of King's Bench determined, that B. was a competent witness in the prosecution, and had been properly admitted to give evidence on the trial; as he could not avail himself of the conviction of A. in any civil proceedings between them either in law or equity.

(1) Smith v. Harris, 2 Starkie, N. P. C. 47.
(2) 1 Salk. 283.
(3) 2 Str. 1043.
(4) Rep. temp. Hard. 358.
(5) 4 East, 572.

A person, who has borrowed money on an usurious transaction, is a competent witness for the plaintiff in an action for penalties against the lender; (1) and whether he has, or has not, repaid the money lent, does not appear to make any essential difference, at least so far as his competency is affected; *for in neither case does he gain any thing immediately by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. (*t*) Borrower, in case of usury.

A witness, who has acted under a bare authority, is not to be excluded from giving his testimony, merely on the ground that he may be liable to an information or an action, in case the fact, which he comes to prove, should be found otherwise. (2) Thus persons, who have been themselves in office, are often called to show what the usage is, and what they did when in office: yet if their acts be illegal, they are liable to quo warranto. If persons were not allowed to be competent witnesses, in matters belonging to corporations, because they may possibly be punished by information, much good evidence would be shut out. Wherever any unlawful act is done in a corporate assembly, the whole assembly are liable to an information; yet the persons, who were present at such assemblies, are always allowed to be good wit- Liability to information action

(1) Abrahams q. t. v. Bunn, 4 Burr. 2251. Smith v. Prager, 7 T. R. 60. See Masters q. t. v. Drayton, 2 T. R. 496.

(2) R. v. Bray, Rep. temp. Hard. 360. 2 Selw. N. P. 1120, S. C. 2 Str. 1069, S. P. Baille v. Wilson, cited 4 Burr. 2254. See Carpenters' Company, &c. v. Hayward, 1 Doug. 374; in which case the witness was properly rejected, on the ground that the verdict would have been evidence against him, as to a right claimed by custom.

* In the case of Smith q. t. v. Frager, the witness said he had repaid the principal sum and interest by drafts, which had been duly honoured, and that he was still indebted to the defendant on a running account for this and other loans. It may be observed, that at the time of the trial, the witness was an uncertificated bankrupt; but this was not considered as furnishing any objection. (The case of Masters q. t. v. Drayton, therefore, in 2 T. R. 496, seems to be over-ruled. See also Ridley v. Taylor, 13 East, 175.) In the first case above cited, of Abrahams q. t. v. Bunn, the witness proved, that he had redeemed the pledges and repaid the principal sum, and he was competent to prove that fact. Lord Mansfield is reported to have said, "that if the defendant had produced a security, or proved the pledge to be remaining in his custody, it would have been a different consideration, whether the witness, who was the borrower of the money, could be examined to contradict this." However, it may be inferred from the case of Jordaine v. Lashbrooke, which has been before mentioned, that this consideration would not now affect the competency of the witness.

(*t*) See Note S7, p. 92.

nesses ; and if they were not allowed, there would be no evidence at all as to such facts. (1)

Bond-security for administrator.

In an action against an administrator, one of the bond-securities for the defendant's due administration of the intestate's effects is a competent witness, on behalf of the defendant, to prove a tender; (2) the Court said, the bare possibility of an action being brought against a witness is no objection to his competency, and that a creditor of the defendant would also have been competent which they considered a stronger case; and Mr. Justice Buller said, " In order to show a witness interested, it is necessary to prove that he must derive certain benefit from the determination of the cause one way or the other. (*u*) In this case, supposing there were no assets, though the defendant would be answerable for the costs, he would not be liable on his bond to the Ecclesiastical Court. He is only bound to distribute the intestate's effects, and it does not appear in this case how they have been applied."

Executor.

A witness may prove a codicil made subsequent to a second will, and reviving a former will, though he has acted under the first will, and might be liable to actions as executor de son tort, if it should be set aside. (3) Indeed, it may be laid down as a general rule, that executors in trust, trustees, and agents, are not incompetent merely on the ground of their liability to actions. (4) (*v*) If a trustee takes a beneficial interest, that is another ground of objection ; but without such an interest, trustees and executors are competent witnesses. (5) (*w*)

Trustee Agent.

Interest on both sides.

If the witness has an interest inclining him to each of the parties, so as upon the whole to make him indifferent, he will be competent to give evidence for either party. Cases of this description will be mentioned afterwards in their place.

(1) By Lord Hardwicke C. J. R. v. Gray (or Bray,) 2 Selw. N. P. 1120.

(2) Carter v. Pearce, 1 T. R. 163.

(3) Baillie v. Wilson, cited 4 Burr. 2254. Goodtitle d. Fowler v. Welford, 1 Doug. 140.

(4) 1 Mod. Rep. 107, Goss v. Tracy, 1 P. Wms. 287. 1 Black. Rep. 366. Gilb. Ev. 123.

(5) Goodtitle dem. Fowler v. Welford, 1 Doug. 140. Bettison v. Bromley, 12 East, 250. Heath v. Hall, 4 Taunt. 328. Phipps v. Pitcher, 6 Taunt. 220. 2 Marshall, 20, S. C. See 1 Ball and Beatty's Rep. 100, 414, and cases there cited, as to the rule in equity.

(*u*) See Note 88, p. 92. (*v*) See Note 89, p. 96. (*w*) See Note 90, p. 98.

In the cases which have been mentioned, the objection against the witness was, that either from the circumstance of his standing in the same situation as the party for whom he was called, or because the verdict might possibly influence the jury in a cause in which he himself might be a party, or from some other reason of the same kind, he expected a benefit from the result of the suit. The witness in those cases would probably have admitted, that he believed himself interested; and it was upon the supposition of this fact, that the objection must have been founded. Those cases, therefore, in which such objections were overruled, appear to have determined this point, that a witness will not be incompetent merely on the ground of his believing himself interested. It is true, if he believes himself interested, the impression on his mind, and his bias in favor of the party calling him, may be as strong as if he were legally incompetent. But the difference is, that, in the one case, the enquiry is more simple and more easily defined; in the other, it is complicated, vague, and uncertain. For the purpose of determining that a witness is incompetent on account of his believing himself interested, it might be necessary to examine him on a great variety of points, which after all would be more proper for the consideration of the jury; as, for example, on the nature of the benefit which he expects, the reasons for his expecting it, and the impression which such an expectation may have produced upon his mind. Such an enquiry would in all cases be extremely indefinite, and would be subject to this great inconvenience, that it might lead to the rejection of a witness, who, on further examination, might appear to deserve the highest credit, and might have it in his power to give important evidence. (*x*)

Witness believing himself interested.

The rule of law respecting interested witnesses is perhaps the best that could be adopted, because it is the least exclusive, and most accurately defined. It excludes such only as have an interest in the event of the suit; not, that in all cases they are likely to feel a stronger bias than persons, who may perhaps expect some benefit from the event, or may be friends or relations to the party, and yet are not on that account incompetent; but the kind of interest, which is marked out as the cause of incompetency, is in general more direct and immediate, and more easily

(*x*) See Note 91, p. 98.

Honorary obligation.

ascertained. It has been held, therefore, that a witness is not incompetent, who believes himself under an obligation of honor to indemnify the bail, unless he has in fact entered into an engagement to that effect. (1) Such an obligation is in general of a nature so uncertain and variable, that it cannot safely be recognized in courts of justice, as a motive of conduct. Besides, where the sense of honor is so strong and binding as to influence him against his interest, it must be unnecessary to reject the witness; as the same principle, which would induce him to pay the costs, would oblige him, in giving his evidence, to speak only the truth; and, in cases where the sense of honor is less firm and imperative, the ground of the objection fails, since the witness is not bound in point of law, and does not feel himself absolutely bound in point of morals. But, independent of this reasoning, another more general answer is, that the ends of justice are most effectually attained by a full and complete investigation of the subject in dispute; and, unless the objection to the witness is strictly a legal objection, he will be admitted to give evidence. In the case supposed, of a witness who says he thinks himself bound in honor to pay the costs, it might be injurious to the party who calls him, to be deprived of his testimony on account of such a fancied obligation; more especially, as it is an obligation which may easily be pretended by the witness, but which it is scarcely possible for the court justly to appreciate, and which, from the nature of the case, the party cannot release, nor enforce against the witness; on the other hand, his testimony may not deserve all the credit due to a witness free from bias, and it ought therefore to be strictly examined and sifted. The witness, then, is to be heard, but his evidence is open to observation. (2)(*y*).

II. Secondly, having shown what is not such an interest in

(1) Pederson v. Stoffles, 1 Campb. 145, S. P. said to have been ruled contra, in an old case, by Parker C. J.; see Fotheringham v. Greenwood, 1 Str. 129.

(2) There are several dicta in support of the position, that a witness is not competent, if he believes himself interested, whether he is or is not interested in strictness of law. By Pratt C. J. in Fotherinsham v. Groenwood, 1 Str. 129, cited and approved by Ld. Loughborough C. J. and by Gould J. in Trelawney v. Thomas, 1 H. Bl. 307, S. P. by Perryn B. in Newland's case, 1 Leach Cr. C. 333. And see a case tried before Lord Mansfield, cited by counsel in Rudd's case, Leach Cr. C. 154. See also the case of the Amitie, Villeneuve, 5 Robinson, Adm. Rep. 344, n.; and the case of the Galen, 2 Dodson, Adm. Rep. 20.

(y) See Note 92, p. 99.

the event of the suit, as will disqualify a witness from giving evidence, we now proceed to enquire, what is such an interest as will disqualify.

General rule.

On the subject of interested witnesses, Ch. B. Gilbert lays down the rule thus: "The law looks upon a witness as interested, where there is a certain benefit or disadvantage to the witness, attending the consequence of the cause one way." (1) Mr. Justice Buller adopts the same rule. (2) And, in the case of the King v. Prosser, where the question was, whether on an appeal against a rate, parishioners, who had rateable property but were not actually rated, were competent witnesses in support of the rate, the same learned judge expressed himself thus: "I take the rule to be this; if the witness can derive no benefit from the cause before the court, he is competent." (3) In the case of Smith v. Prager (4) Lord Kenyon said, "the case of Bent v. Baker (5) laid down a clear and certain rule, by which I have ever since endeavoured to regulate my opinion. The rule, there laid down, was, that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." The same rule was approved and adopted in the case of King v. Boston; (6) and in many later cases has been expressly referred to, as the great leading principle on this subject.* (z)

The general rule, then, is, that if the verdict can be used in evidence against the witness, in case the party, for whom he is called, should fail in the action,—or, if the witness can avail himself of the verdict, so as to give it in evidence in support of

(1) Gilb. Ev. 106, 7.
(2) Bull. N. P. 284. 3 T. R. 36.
(3) 4 T. R. 17.
(4) 7 T. R. 62.
(5) 3 T. R. 27.
(6) 4 East, 582.

* The law of Scotland is not so strict on this subject. The general rule, in the Scotch Courts of Justice, is, that no interest in the issue of a cause shall be held to disqualify a witness, (whatever effect it may have on his credibility,) unless it is not only a direct and immediate interest, but one which at the same time flows from some undue and corrupt interference on the part of the witness. See Burnett's Treatise on the Criminal Law of Scotland, p. 440.

(z) See Note 93, p. 99.

his own claims, that this is a direct and immediate interest in the event of the suit, which will render him incompetent. (1)

1. When the verdict can be used in evidence against the witness. (*a*)

Servant. In an action against a master for the negligence of his servant, the servant is not a competent witness to disprove his own negligence; for the verdict may be given in evidence in a subsequent action by the master against the servant, as to the quantum of the damages, though not as to the fact of the injury. (2) (*b*)

Broker. Agent. A broker is not competent, for the same reason, in an action against the principal, to disprove the negligence of the defendant in the course of his employment. (3)

Tenant in possession. In an action of ejectment, the tenant in possession, upon whom an ejectment has been served, is not a competent witness in support of the title of the defendant, under whom he holds; for he is liable to the mesne profits, and the verdict in ejectment would be evidence against him in an action to recover them. (4) (*c*)

Landlord. In an action against a sheriff for a false return to a writ of *fieri facias*, in which return he stated that he had paid a sum of money to the landlord of the premises for arrears of rent, the landlord is not competent to prove the rent due; for if this action were to succeed, the witness would be liable to an action at the suit of the sheriff, in which the judgment in this case would be evidence of special damages. (5)

2. When the verdict may be used by the witness in support of his own claims. (*d*)

Where a right of common is claimed by custom, one, who

(1) 3 T. R. 32, 33, 36. 7 T. R. 62. 4 East, 582.

(2) Green v. New Riv. Company, 4 T. R. 589. Martin v. Henrickson, 2 Ld. Raym. 1007. Miller v. Falconer, 1 Campb. 251. 15 East, 474, 3 Campb. 516. Rotheroe v. Elton, Peake, N. P. C. p. 84, stated in vol. 2. Morish v. Foote, 2 Moore, C. P. 508. 8 Taunt. 454, S. C. The competency and incompetency of servants, brokers, factors, and agents, is considered more fully in Ch. V. infra.

(3) Gevers v. Mainwaring, Holt, N. P. C. 139. Vide infra, Ch. V.

(4) Bourne v. Turner, 1 Str. 632. Doe dem. Foster v. Williams, Cowp. 621.

(5) Keightley v. Birch, 3 Campb. 521.

(*a*) See Note 94, p. 106. (*b*) See Note 95, p. 106. (*c*) See Note 96, p. 107. (*d*) See Note 97, p. 107.

Commoners and persons claiming under custom.

claims under the same custom, cannot be a witness in support of the claim, as he might afterwards use the verdict in his own cause to establish a similar customary right for himself.(1) (*e*) So where in an action on the case against the defendant for not repairing his fences contiguous to a common, (on which common the plaintiff prescribed for common appurtenant,) one of the points in issue was, whether the defendant was liable to repair by reason of his occupation, it has been determined, that other persons, who claimed a right of pasture over the same common, were not competent witnesses for the plaintiff; (2) the Court said, the record would be evidence for another commoner, that the occupier of the adjacent land was bound to repair this fence; and though the plaintiff in that case claimed a right of common by prescription in right of a particular messuage, still the other commoners, by whatever title they might claim, would have a common interest in casting the burthen of the repair of this individual fence upon the occupier of the adjacent land. So, where the question is, whether in a particular parish or vill, certain things are generally exempted from tithes, or subject only to a modus, no person who would be subject to tithes, if the parson's claim were to be allowed, can give evidence in support of the modus or exemption. (3) So, where a defendant in an action of trespass justifies under a custom in the parish for out-going tenants to take the away-going crop, he cannot call as witness an occupier of land, who insists upon the same right for himself.

Modus.

Customary tenant-right.

Common by vicinage.

"It is no good objection to a witness," says Ch. B. Gilbert,(4) "that he has common by cause of vicinage in the lands in question, for this is no interest in the land, but only an excuse for trespass; and let who will recover the lands, the whole right of common remains, so that he is certainly indifferent in point of interest between the two contenders." However, this position may perhaps be doubted, as the rule is now clearly established, that a witness, who can use the verdict in an action brought either by or against himself, is not competent; and since com-

(1) 1 T. R. 302. 3 T. R. 32. Bull. N. P. 283. Hockley v. Lamb, 1 Ld. Raym. 731.

(2) Anscomb v. Shore, 1 Taunt. 261.

(3) Ld. Clanricard v. Lady Denton, 1 Gwill. 360. Gilb. Ev. 113.

(4) Gilb. Ev. 109.

(*e*) See Note 98, p. 108.

mon by cause of vicinage is in the nature of common appendant, and implies immemorial usage of intercommoning, it is presumed, that a verdict, finding the existence of such an usage, would be evidence for the witness, if he were to justify under the same usage in an action of trespass. It may be observed that Ch. B. Gilbert does not once mention the power of using the verdict, as a criterion for determining, whether the witness is incompetent; so undefined, at that time, was the rule of evidence on this subject. (*f*)

Customary charge.

On the trial of an issue, whether the owners of property within a chapelry are liable by immemorial usage to a charge of repairing the chapel, an owner of property within the chapelry is not a competent witness to disprove the liability, though his property is in the occupation of a tenant, who agrees to pay rent without any deduction: for he is immediately interested in removing such a permanent charge, and thus improving the value of his estate. (1) And in an action against the defendant for exercising a trade in breach of a custom, which, as was alleged in the declaration, confined that and other trades to the members of a corporate company, a witness who claims for himself a right to exercise a trade, though not a member, is not competent to negative the existence of such a custom; for he is interested, that the defendant should have a verdict, which he may use in his own defence, in case a similar action should be brought against himself. (2)

Custom as to trade.

Custom.

Prescriptive right.

Where, indeed, the issue does not affect any customary right, but is merely on a right of common claimed by prescription, as belonging to the estate of A., one who claims a prescriptive right of common in right of his own estate may be a witness; (3) for though A. may have such a right of common, it does not follow that B. has, nor would the verdict in the action of A. be evidence in B.'s action.

3. Incompetency from liability to costs.

(1) Rhodes v. Ainsworth, 1 Barn. & Ald. 87. See Meredith v. Gilpin, infra.

(2) Comp of Carpenters in Shrewsbury v. Hayward, 2 Doug 373.

(3) Harvey v. Collison, MS. case, stated 1 Selw. N. P. 1 T. R. 302. Bull. N. P. 283.

(*f*) See Note 99, p. 109.

Persons liable to the costs of the action have a direct and immediate interest in the event, and therefore are not competent witnesses for the party to whom they would be so liable. (*g*) Thus the defendant's bail are not competent to give evidence for their principal, (1) because they are immediately answerable in case of a verdict against the defendant. (*h*) Liability to costs. Bail.

For the same reason, a co-defendant cannot be examined as witness for another defendant, though he is a formal party merely, and has no interest in the cause. (2) A party to the suit, of all persons, has the strongest interest in the event of the cause. This will be the subject of a subsequent section. (3) Party.

In an action against the sheriff for a false return, the sheriff's officer, who has given security for the due execution of process, is not a competent witness, to prove that he endeavored to make the arrest. (4)(*i*) So, in an action by an infant plaintiff, his prochein amy and guardian are not competent witnesses for him, being liable to costs. (5) (*j*) Sheriff's officer. Prochein amy.

One in partnership with the defendant is not a competent witness for the defendant, to discharge a debt to which as partner he would be jointly liable. In an action of assumpsit for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and to one J. S., who were partners in trade, Lord Kenyon held that J. S. could not be a witness for the defendant, to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase except as his servant; for by discharging the defendant he benefits himself, as he would be liable to contribute and pay a share of the costs which the plaintiff seeks to recover. (6) Partner.

And a partner is not a competent witness for the defendant to prove that the delivery was on the partnership account, and that

(1) 1 T. R. 164. Piesley v. Von Esch, 2 Esp. N. P. 606.
(2) Dixon v. Parker, 2 Ves. 219, and other cases cited in 13 Price, 512.
(3) See sect. 2 of this chap.
(4) Powell v. Hord, 2 Ld. Raym. 1411. 1 Str. 650, S. C. 3 Campb. 523.
(5) James v. Hatfield, 1 Str. 548. Hopkins v. Neal, 2 Str. 1026. Gilb. Ev. 107. Head v. Head, 3 Atk. 511, 547. See 1 Cox's Cases in Chan. 286.
(6) Goodacre v. Breame, Peake, N. P. C. 174.

(*g*) See Note 100, p. 109. (*h*) See Note 101, p. 109. (*i*) See Note 102, p. 110. (*j*) See Note 103, p. 110.

Liability to costs.

the goods had been paid for. (1) So a partner is not competent for the defendant, to prove his joint liability with the defendant, in support of a plea in abatement. (2) This is an interest which the defendant cannot effectually remove by a release to the witness; (3) for though the release might be a bar to a suit for contribution between the defendant and the witness, yet nevertheless, if the defendant were to die or become insolvent, the plaintiff would have a right, by a bill in equity, to compel all the parties to contribute, and in this suit the witness would still be liable to his share. (4)(*k*)

In the cases above mentioned the witness would have been competent for the plaintiff, though incompetent for the defendant. In assumpsit for goods sold and delivered, and the general issue pleaded, a partner was called on the part of the plaintiff, to prove that the defendant had a share in the concern jointly with himself; and the court of King's Bench held, that he had been properly admitted; for his interest would rather incline him against the plaintiff, since, in case of his gaining a verdict, he would be liable to contribute at the suit of the defendant. (5) It was argued, that the witness was interested to fix the defendant with a part of the debt, as otherwise he might himself be made liable to pay the whole. The answer to this is, that the defendant would have a right to recover from the witness, in an action at law for money paid to his use, the whole sum recovered in this action, if he should shew that the witness was originally liable to pay it. The case of Hudson against Robinson, (6) 4 Maule and Selw. 476, stated *infra*, is another instance, to shew the competency of a partner of the defendant, as witness for the plaintiff.

In an action by an indorsee against an indorser of a bill of exchange, a witness who is indebted to the plaintiff, and for whom

(1) Evans v. Yeatherd, 2 Bing. 133. Cheyne v. Koops, 4 Esp. 112.

(2) Young v. Bairnes, 1 Esp. 103. He would have been competent for the *plaintiff*. Cosham v. Goldney, 2 Stark. N. P. C. 414

(3) Temins v. Smith, by Ld. Tenterden C. J., 1 Ry. & Mo. 29. Cheyne v. Koops, 4 Esp. 112.

(4) By Lord Alvanley, in Cheyne v. Koops, 4 Esp. 112. In this case a release was proposed from the defendant to the witness, and also from the witness to the defendant.

(5) Blackett v. Weir, 5 Barn. & Cres. 385.

(6) By Holroyd J. and Littledale J, p. 388.

(*k*) See Note 104, p. 111.

the defendant indorsed the bill as security for the debt, is not competent for the defendant: being liable to him for the costs of the action. (1) Liability to costs.

In an action by an indorsee against the acceptor of a bill, which had been accepted for the accommodation of the drawer, the drawer is not a competent witness for the defendant, to prove that the holder took the bill for an usurious consideration. This was determined in the case of Jones v. Brooke. (2) The Court of Common Pleas there held, that the witness was interested to defeat the action; for, if the holder should succeed against the acceptor, the acceptor would not only have a right of action against the drawer for the principal sum, but also for all damages, which as acceptor he might sustain in being sued upon the bill; the drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of his acceptance for his accommodation.*(*l*) Drawer of accommodation bill

In an action by an indorsee against the maker of a promissory note, the payee and indorser, who has become bankrupt since the date of the note, and has obtained his certificate, is not competent on the part of the defendant, to prove that the note was an accommodation note, and indorsed to the plaintiff after it became due; for, having obtained his certificate, he is no longer liable to the plaintiff on his indorsement, but he will be liable to the defendant, if the defendant should be obliged by this action to pay the promissory note, which he had given for the witness' accommodation. (3) Payee and indorser.

(1) Bottomley v. Wilson, 3 Stark. N. P. C. 148.
(2) 4 Taunt. 464.
(3) Maundrell v. Kennett, 1 Campb. N. P. C. 408. before Bayley J.

*In the case of Birt v. Kirshaw, 2 East, 458, the Court of King's Bench held, hat the endorser of a note, who had received money from the drawer to take it up, was a competent witness, in an action by the endorsee against the drawer, to prove on the part of the defendant, that he had satisfied the note; since he would be liable on the note to the plaintiff, if the defendant succeeded, or to the defendant in an action for money had and received, if the plaintiff succeeded; and the Court was of opinion that the witness was not rendered incompetent by the circumstance of his being also liable to the defendant, in the latter case, for the costs of this action in consequence of his non-payment. But this decision is inconsistent with later authorities. The liability to the costs of the action, as appears from several cases

(*l*) See Note 105, p. 113.

Liability to costs.

Agent

Agent to discount a bill.

An agent of one of the parties to the suit is not a competent witness, if, in case of the verdict being against the party for whom he is called, he would be liable to him for the costs of the action. In an action on a bill of exchange against the drawer, where the question was, whether the bill, as the defendant maintained, had been delivered by one A. B. to the plaintiff to be discounted, or whether it had been delivered in payment for goods, which A. B. had bought of the plaintiff, Ch. Just. Gibbs held that A. B. was not a competent witness for the defendant, to prove the former of these facts; for if A. B. had received the bill merely to get it discounted, and, instead of doing so, if he pledged it for his own debt, he would be liable for the costs of this action, as special damage resulting from his breach of duty. (1) (*m*)

Agent for receiving money.

In an action of assumpsit, a person who has received money due from the defendant to the plaintiff, is not a competent witness for the defendant (according to what is now understood to be the rule,) to prove that he received the money from the defendant, as agent for the plaintiff: for though he is liable to pay the money received or to refund it to the defendant, he is liable also to the defendant for the costs of the action, in case the plaintiff should have a verdict. (2)

Co-obligor.

In an action on a joint and several bond against one of the obligors, who was surety for another, that other obligor (the principal) is not competent for the defendant, to prove a payment of money by himself in discharge of the bond: for he has an interest in favor of his surety to the extent of the costs of the action. (3) (*n*)

(1) Harman v. Lasbrey, Holt, N. P. C. 390, by Gibbs, C. J.

(2) In Ilderton v. Atkinson, 7 T. R. 480, the witness was thought to be competent for the defendant. But see Jones v. Brooke, supra, p. 61, and 14 East, 567.

(3) Townend v. Downing, 14 East, 565. See also Trelawney v. Thomas, 1 H. Bl. 306. And Ball v. Bostock 1 Str. 575, as to competency from liability to costs.

here mentioned, is a substantial objection to the competency of a witness; and however indifferent he may be in other respects towards either party, yet, if he has incurred such a liability, he has an immediate and direct interest in the event of the suit.

(*m*) See Note 106, p. 113. (*n*) See Note 107, p. 113.

4. Other direct interest in the event of the suit.

Benefit or loss depending on the event.

A certain, direct, and immediate interest will disqualify, although it may happen that the verdict in the cause cannot be evidence, either for or against the witness, in any future suit concerning that interest. "The law," says Ch. Baron Gilbert, "looks upon a witness as interested, when there is a certain benefit or disadvantage to the witness, attending the consequence of the cause one way." (1) The following examples may be cited to illustrate this general rule.

A person who has deposited in the hands of a sheriff, in lieu of bail, a sum of money, which by rule of court is made to abide the event of the suit, is not competent for the defendant. (2)

Residuary legatee.

In an action by an executrix to recover a debt due to the testator, a residuary legatee has an interest, in favour of the plaintiff, even after releasing all claim to the debt in question: for though the plaintiff would not be liable as executrix, for costs to the defendant, she must pay costs to her own attorney, and then she would be entitled to be allowed out of the estate, and thus the residue, in which the witness is interested, would be diminished. (3)(*o*)

In assumpsit on a policy of insurance, when the declaration averred that the policy was made in the names of the plaintiffs as agents, for the sole use and benefit of A. and B., who were interested in the goods, A. is not a competent witness for the plaintiffs, being liable to the attorney employed to bring the action. (4).

Agreement for lease.

If a plaintiff agree with a witness, that, in case he recover the lands, he will grant him a lease of them for so many years, this excludes his evidence; for the witness would have a fixed and certain advantage by the event of the verdict. (5) (*p*) So a witness

(1) Gilb. Ev. 106. Bull. N. P. 284. 3 T. R. 36.
(2) Lacon v. Higgins, 3 Stark. N. P. C. 182.
(3) Baker v. Tyrwhitt, 4 Campb. 21.
(4) Bell *v.* Smith and others, in error, 5 Barn. & Cress. 188.
(5) Gilb. Ev. 108.

(*o*) See Note 108, p. 114. (*p*) See Note 109, p. 119.

has been rejected, who if the plaintiff failed in the action was to repay a sum of money in his hands belonging to the plaintiff, but was not to repay any part of it, if the plaintiff succeeded. (1) (*q*)

Underwriters paying conditionally.

In the case of Forrester v. Pigou, (2) an action on a policy of insurance, where the defendant called another underwriter, as witness, who in his examination on the voire dire said, he had paid the loss to the plaintiff upon an undertaking, that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff promising to return the money on that event, Lord Ellenborough C. J. on the trial rejected the witness. On a motion afterwards for a new trial on account of this rejection, the Court sent the case to be retried, for the purpose of ascertaining more particularly the time when the undertaking was made to the witness; but on that occasion Lord Ellenborough said, "If a person, who is under no obligation to become a witness for either of the parties to the suit, choose to pay his debt beforehand, upon a condition that it is to be determined by the event of that suit, he becomes as much interested in the event, as if he were a party to a consolidation rule."

Witness discharging his own debt, with the goods in question.

In an action of trespass against a sheriff, where the question was, whether goods, which had been taken by him in execution in a suit against A. B., belonging to A. B. or to the plaintiff, A. B. was not allowed to be a witness for the defendant to prove the goods his property; for the effect of his evidence would be to pay his own debts with the plaintiff's goods. (3) (*r*) Upon the same principle, in an action of replevin, in which the defendant made cognizance as bailiff of A. B., for rent due from the plaintiff to A. B., and the question was, whether the plaintiff, who was under-tenant to A. B., was liable to pay the rent mentioned in the declaration, or a less rent, the Court of Common Pleas held, that A. B. was not a competent witness on the part of the defendant, to prove that the plaintiff had agreed to pay him the higher rent mentioned in the declaration. (4)

(1) Fotheringham v. Greenwood, 1 Str. 129.
(2) 1 Maule & Selw. 9.
(3) Bland v. Ansley, 2 New Rep. 331. Upton v. Curtis, 1 Bing. 210. 8 Moore, 52, S. C.
(4) Upton v. Curtis, 1 Bing. 210.

(*q*) See Note 110, p. 119. (*r*) See Note 111, p. 120

Devisee. A devisee, who takes a vested interest under a will in the testator's estate, has been considered incompetent to prove his sanity, or the due execution of the will, in an action of ejectment brought by another devisee against the heir-at-law.* Executor. An executor, who takes a pecuniary interest in a will, is competent on a question of sanity in an action of ejectment; for the verdict would not be evidence in the ecclesiastical court, as to the personality. (1) Legatee. And upon the same principle, a legatee seems also to be competent in such a case. Heir. An heir-apparent is a competent witness concerning the title of the land; Remainder-man. for the heirship is a mere contingency: but a remainder-man is not competent on such a subject, having a vested estate in the land. (2) (*s*)

Tenant in possession in ejectment. In an action of ejectment, where the plaintiff had made out a prima facie case against the defendant as tenant in possession, the Court of Common Pleas held, that a witness, called on the part of the defendant, was not competent to prove himself the real tenant, and that the defendant was only his bailiff; for the verdict would have the effect of turning him out immediately; it was, therefore, an immediate interest, and out-weighed the remoter effect of his subjecting himself by his testimony to an action of ejectment and trespass for mesne profits. (3) (*t*)

Wife of interested witness. Whenever the husband of a witness would be incompetent to give evidence on account of his interest in the event of the cause, it must necessarily follow that the wife also will be excluded, having an unity of interests with her husband. (*u*)

Degree of interest. If there is a direct interest in the event of the suit, it will make the witness incompetent, however small and inconsiderable the degree of interest may be. (*v*) Thus, in an action of trespass, where the question was, whether a corporation which

(1) Doe dem. Wood v. Teage, 5 Barn. & Cress. 335.
(2) Smith v. Blackham, 1 Salk. 283.
(3) Doe dem. Jones v. Wildo, 5 Taunt. 183. 1 Marshall, 7 S. C.

* One of the points resolved, on the trial at bar, in Pyke v. Crouch, 1 Ld. Raym. 730, was, that a *legatee* is incompetent to prove a will; and in Helliard v. Jennings, 1 Ld. Raym. 505, on an issue of *devisavit vel non*, it was assumed as a clear proposition, that a *devisee* was not competent.

(*s*) See Note 112, p. 122. (*t*) See Note 113, p. 123. (*u*) See Note 114, p. 125. (*v*) See Note 115, p. 125.

had inclosed part of a common, had left a sufficiency for the commoners, a freeman was considered incompetent to prove the affirmative, because the rent must have been received for the use of the corporation; (*w*) though it was admitted that the amount of the rent was exceedingly small. (1) * Hence it appears, that a person who loses or gains the smallest sum by the event of a suit, whatever may be his rank, fortune, or character, is as incompetent to give evidence, as one who may be interested to the amount of thousands. This is the unavoidable consequence of the general rule. If interest is allowed to disqualify in any case, it must in all; as it is impossible by any scale to measure the different effects which it may have on different minds.

Freeman member of corporation.

5. Cases, in which the witness is interested on both sides. (*x*)

Interest on both sides.

If the witness has an interest inclining him to each of the parties, so as upon the whole to make him indifferent, he will be competent to give evidence for either party. Thus, in an action of assumpsit for money paid to the use of the defendants, who were ship-owners, Lord Kenyon admitted the captain to prove that he had received the money from the plaintiff for the defendant's use; for he stood indifferent between the parties, and, whichever way the verdict might go, he was equally answerable. (2) So, in an action of covenant for rent, where the point in issue was, whether A. B., whose title both the plaintiff and the defendant admitted, had demised the premises first to the plaintiff or to a third person? A. B. was a competent witness to prove that fact; for the verdict could not be given in

Captain of a ship.

Priority of demise.

(1) Burton v. Hinde, 5 T. R. 174.
(2) Evans v. Williams, 7 T. R. 481, n. (*c*) Rocher v. Busher, 1 Starkie, N. P. C. 27.

* See R. v. Mayor and Commonality of London, 2 Lev. 231, R. v. Carpenter, 2 Show 47, and case of City of London, 1 Ventr. 351, contra. In these cases, freemen were admitted to be witnesses on account of the minuteness of their interest, against the opinion of Jones J. The law of the case in 2 Lev. (where the point is precisely the same as in the other two cases) has been doubted by Mr. Justice Buller; see Bull. N. P. 290. In the case of Dowdeswell v. Nott, 2 Vern. 317, the Court said, "The objection of an existing interest, though never so small, has always prevailed, and it was so resolved, upon great debate, in the case of the City of London concerning the water-bailiff."

(*w*) See Note 116, p. 125. (*x*) See Note 117, p. 126.

evidence in any future action either by or against the witness, being a record between other parties; and it appeared to be indifferent to him, whether he had the one or the other as his tenant. (1)

Acceptor. In an action on a bill of exchange, by the indorsee against the drawer, the acceptor is a competent witness on the part of the plaintiff, to prove that he had no effects of the drawer in his hands: (2) and so is the payee, to prove that he indorsed the bill to the plaintiff before it became due, in payment for goods; for though he would be liable to the plaintiff for the goods sold, if this action fail, yet, if it succeed, he would be liable to the defendant for money paid. (3) (*y*)

Payee.

Co-obligor. In an action on a bond against one of several obligors, another of the obligors is competent, for the plaintiff, to prove the execution of the bond. (4) So, in an action on a promissory note, by the payee against the maker, a joint maker of the note, who is not sued, is competent to prove the defendant's signature; (5) for if the plaintiff recover against the defendant, the witness would be liable to him for contribution; and, if he fail, he might resort to the witness for the whole, and in that case the witness would be entitled to contribution from the defendant, so that in either point of view the witness stands indifferent between the parties.

Joint maker of note.

Partner. Where one of two partners drew a bill in the name of the firm, and gave it in payment to his own separate creditor in discharge of his own debt, the Court of King's Bench held, that, in an action by such creditor against the acceptor, the other partner might be called for the defendant to prove that the one who drew the bill had no authority to draw it in the name of the firm; and that the bankruptcy of the partners would not vary the question as to his competency; for though he would be liable

(1) Bell v. Harwood, 3 T. R. 308. See Serle v. Serle, 2 Roll. Abr. 685. tit. Trial, (G,) cited Gilb. Ev. 109.

(2) Staples v. Okines, 1 Esp. N. P. C. 331.

(3) Shuttleworth v. Stephens, 1 Campb. N. P. C. 408.

(4) Lockhart v. Graham, 1 Str. 35.

(5) York v. Blott, 5 Maule & Selw. 71.

(*y*) See Note 118, p. 131.

to the defendant if the plaintiff should recover, he would have his remedy over against his partner. (1).

Partner.

In the case of Hudson v. Robinson, (2) which was an action of assumpsit for the non-delivery of goods and for money had and received, and the defendant pleaded in abatement, that the promises were made by the defendant jointly with A. and B., and not by the defendant alone, the Court of King's Bench determined, that A. was a competent witness for the plaintiff, to prove that the defendant was not authorised or employed by the partners to make the contract, and that he received the money to his own use; for, although the plaintiff should succeed, the defendant would not on that account be precluded from suing the other partners for contribution; the record in this action would not operate as an estoppel against him on that occasion, because there is no mutuality, out of which the estoppel can arise; the record could only be used, as a medium of proof, to show that this defendant had paid in the action a certain sum; and, in this point of view, the verdict in favor of the plaintiff must be considered rather as prejudicial to the witness. (*z*)

Co-trespasser.

In actions of trespass, it is the common practice to call a witness to prove that he committed the trespass in question by the command of the defendant. (3) It is true, that a recovery against one of several co-trespassers is a bar to an action against the others, and would operate as a discharge of the witness from an action at the suit of the plaintiff, for the same trespass. On the other hand, it seems that he would be liable over to the defendant for all the costs and damages recovered against him in the action of trespass, if the defendant can show that the trespass was not committed by his order; and the verdict in that case, could not be used in evidence on either side. (4) (*a*)

(1) Ridley v. Taylor, 13 East, 182, l. 3. This was laid down by the court, during the argument. And Lord Ellenborough, in delivering the judgment of the court on a subsequent day, stated that both the partners (the one who drew without authority in the name of the firm equally with the other) would be competent for the defendant. See p. 184, 185. It was not considered, in this case (for it was not necessary), whether the partner, who so drew the bill, would be liable to the defendant for the costs of the action.

(2) 4 Maule & Selw. 476. Cossham v. Goldney, 2 Starkie, N. P. C. 414, S. P.

(3) 5 Barn. & Cress. 387.

(4) See 5 Barn. & Cress. 388. Unless this is so, there appears to be a strong interest in the witness.

(*z*) See Note 119, p. 134. (*a*) See Note 120, p. 134.

The Court of King's Bench held, in the case of Buckland v. Tankard, (1) that a witness, who might have a remedy by action, whether the plaintiff or defendant had a verdict, was nevertheless interested, because, under the particular circumstances, he would have greater difficulty in the one case, than in the other, to enforce that remedy. However, this appears to be the only case, which has been decided on such a ground; and from the leading cases on this subject, which rest on the broad ground of interest, such a circumstance may now more properly be considered as having a strong influence on the witness, but not as forming any solid objection to his competency. (*b*)

Sect. II.

Of the Rule on the Subject of Interest, considered with reference to the Parties in the Suit.

Party incompetent.

A PARTY to the suit on the record cannot be a witness at the trial for himself, or for a joint suitor, against the adverse party, (2) on account of the immediate and direct interest which he has in the event, either from having a certain benefit or loss, or from being liable to costs. (*c*)

Trustees.

The party, therefore, in whose name an action is brought, cannot be a witness, though he be merely a trustee for some other person. (3) (*d*) A prochein amy suing for an infant is not competent. (4) (*e*) Persons appointed governors and directors of the poor of a parish, under an act of parliament, which authorises them to assess rate on the inhabitants, but in case of appeal makes them liable to costs, to be indemnified out of the parochial fund, are not competent witnesses on the trial of such appeal; as they are parties to the suit, and liable to costs individually in the first instance. (5) (*f*) But there is no objection, it is said, to the competency of persons,

Directors of the poor.

Person sued in corporate capacity.

(1) 5 T. R. 579.
(2) 1 Vern. 230. 1 P. Wms. 596. Gilb. Ev. 116.
(3) Bauerman v. Radenius, 7 T. R. 659. Phillips v. Duke of Buckingham, 1 Vern. 230. And see the cases cited in 13 Price, 512.
(4) Clutterbuck v. Lord Huntingtower, 1 Str. 505. James v. Hatfield, 1 Str. 548. Hopkins v. Neal, 2 Str. 1025. Gilb. Ev. 107.
(5) R. v. St. Mary Magdalen, Bermondsey, 3 East, 7.

(*b*) See Note 121, p. 134. (*c*) See Note 122, p 134. (*d*) See Note 123, p. 139. (*e*) See Note 124, p. 139. (*f*) See Note 125, p. 139.

who are party to a suit in a corporate capacity, and consequently not individually liable to costs, and who are free from all interest in the question. Thus, in an action against the governors of the Foundling Hospital for the amount of work done by the plaintiff, Lord Kenyon admitted several of the governors to prove the badness and insufficiency of the work. (1) (*g*)

Order for examination of party.

Courts of equity, in granting an issue to be tried at law, frequently direct, that a party to the suit shall be examined at the trial as a witness ; such an order waives no objection, except that which arises from the circumstance of the witness being party in the cause.(2) An order, allowing one party to examine the other, warrants his counsel in putting questions to the other party, as to an adverse witness, in the form of cross-examination. (3)

Exceptions.

An exception to the general rule is stated by Rolle C. J., in the case of an action against a hundred on the statute of Winton, (4)

In action on st. of Winton.

where the plaintiff (the party robbed) was allowed to prove the robbery and the amount of his loss, "from necessity, on default of other proof." (5) So, in the case of Bennet v. Hundreds, Hertford,(6) which was an action on the same statute, brought by a carrier for a robbery committed in his absence on his servant,

When competent.

the court ruled against the opinion of Rolle C. J., that the plaintiff might prove the amount of the money, which he had delivered to his servant. And the 15th section of the statute 3 G. 2, c. 16, recites, that in an action against the hundred the person robbed may prove the robbery, and the property of which he was robbed.

When not.

But though the plaintiff may prove the fact of the robbery, yet with respect to matters which may be proved by other evidence, he is not a competent witness. Thus he cannot give evidence to prove, that the place, where he was robbed, is within the hundred, against which he has brought the action. (7)

(1) Weller v. The Governors of Foundl. Hosp. Peake, N. P. C. 153. And see Barrett v. Gore and another, 3 Atk. 401.

(2) Rogerson v. Whittington, 1 Swanston, Ch. Rep. 39.

(3) Clarke v. Saffery, 1 Ry. & Mo. 126, by Best, C. J.

(4) St. 13 Ed. 1. c. 2.

(5) 2 Roll. Ab. 686. Bull. N. P. 289. 1 Atk. 37, 38.

(6) 2 Roll. Ab. 686. Vin. Ab. Ev. (I), pl. 34.

(7) By Page J. Rep. temp. Hard. 83.

(*g*) See Note 126, p. 139.

Inhabitants of hundred.

And though the party robbed, who brought the action, has been allowed to be a witness even in his own cause, yet none of the inhabitants of the hundred were formerly received on behalf of the hundred, however inconsiderable their interest might be; (1) but now they are competent witnesses by the statute 8 G. 2, c. 16, s. 15.

In action for malicious prosecution.

One other exception appears to have been made in the case of an action for a malicious prosecution, where it seems to have been understood, that the evidence, which the defendant himself gave on the trial of the indictment, may, under certain circumstances, be received in his favor on the trial of the action. In the case of Johnson v. Browning, (2) Lord Holt C. J. admitted in evidence the oath of the defendant's wife, (who was the only person present at the time of the supposed felony, and who, as the report says, could not herself be a witness,) to prove the felony committed; "for otherwise, it is said, one that should be robbed would be under an intolerable mischief; if he prosecuted for such robbery, and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution without the possibility of making a good defence, though the cause of prosecution were ever so pregnant." And Mr. Justice Buller, treating of this action, says, "As it may come to be left to a jury, it is advisable for the defendant to give proof of a probable cause, if he be capable of doing it: and for this purpose proof of the evidence given by the defendant on the indictment is good." (3)

Members of corporation.

In the case of the Mayor and Commonalty of London, (4) and that of the city of London concerning water-bailage, (5) the point in issue was, whether the corporation was entitled to certain tolls; in the first case, it was ruled by the whole court, and by three judges in the last, that freemen (members of the corporation) might be witnesses in support of the claim, because the tolls would be received for the benefit of the whole corporate body, and the interest of any individual must therefore be in-

(1) R. v. Carpenter, 2 Show. 47.
(2) 6 Mod. Rep. 216.
(3) Bull. N. P. 14, citing Cobb v. Car. 1746.
(4) 2 Lev. 231. And see Corp. of Sutton Coldfield v. Wilson, 1 Vern. 254.
(5) 1 Vent. 351.

considerable. But Mr. Justice Buller has doubted the law of the former case, (1) and its authority is still further shaken by the case of Burton v. Hinde, before mentioned. (2) (*h*)

Party not compellable to give evidence.

As a party to the suit is not suffered to be a witness in support of his own interest, so he is never compelled in courts of law to give evidence for the opposite party against himself. On a question of settlement, it has been determined, in the case of the King against Woburn, that the rated inhabitants of either parish, being in reality the parties to the proceeding, could not be compelled to give evidence against their own parish. (3) So, in an action of ejectment, on the several demises of two lessors, one of them is not compellable to give evidence for the defendant, though no title has been proved under his demise. (4) The lessors of the plaintiff, said Lord Ellenborough, are substantially the parties on the record; all are jointly liable; that lessor, upon whose title the recovery proceeds, is generally the trustee of the other; and there are the same reasons for protecting them from being examined, which have produced the general rule of law, that the parties on the record cannot be compelled to give evidence against themselves, and are not permitted to swear in their own favor. (*i*).

Rated inhabitants.

Lessor of plaintiff.

Co-plaintiff witness against another.

Where one of several co-plaintiffs comes forward voluntarily to disprove the defendant's liability to the demand made upon him, it has been thought, that, with the consent of the adverse party, he may be admitted, though at the same time he defeats the claim of those, who jointly sue with him; (5) for, if the plaintiff were to make a declaration against his interest out of court, evidence of that declaration would be admissible; and how is the proof less credible, said C. J. Mansfield, if, with the consent of the defendant, who waives all objection to his testi-

(1) Bull. N. P. 290.

(2) 5 T. R. 174. See ante, p. 66.

(3) R. v. Woburn, 10 East, 403. This case was decided before the late act, st. 54 G. 3, c. 170. See infra, Sect. 7, of this Chapter.

(4) Fenn dem. Pewtress v. Granger, 3 Campb. N. P. C. 178.

(5) Nordon and another v. Williamson, 1 Taunt. 378, by Mansfield C. J. and Chambre J. who were the only judges present. This appears to be the only authority as to the admissibility of one co-plaintiff against another. See the case of Mant v. Manwaring and Chapman v. Graves, infra, p. 75, as to the incompetency of one co-defendant against another."

(*h*) See Note 127, p. 140. (*i*) See Note 128, p. 141

mony, he declares the same thing upon oath at the time of the trial? (*j*)

Co-defendant when competent for another.

The general rule seems to be, that one of several defendants is not entitled to a verdict, separately from the rest, at the close of the plaintiff's case, although the plaintiff has failed in proving the charge against him; and therefore cannot be used as a witness for the other defendants, until the whole of the case of the other defendants, exclusive of the evidence which he may have to give, is entirely finished. (1) When that is done, and there is no evidence to implicate him, a verdict may be taken for him separately, with the consent of the counsel, and then he may be examined on behalf of the rest. (*k*)

If any person, writes C. B. Gilbirt, be arbitrarily made a defendant to prevent his testimony in the cause, the plaintiff shall not prevail by that artifice, but the defendant against whom nothing is proved, shall notwithstanding be sworn; for here the defendant does not swear in his own justification, but in justification of another, with whom he is unnecessarily joined: and if this were not allowed, the plaintiff might turn all the several witnesses into defendants, and thus might be able to prove what he pleased without contest. (2) But this rule must be understood with reference to the case, where there is no kind of evidence against such defendant; for if there be evidence against him, though not enough to convict him in the judge's opinion, yet such person cannot be a witness for the other, but his guilt or innocence must await the event of the verdict, the jury being judges of the fact. (*l*)

Co-trespasser.

In trespass against a person, "for that he, together with A. B," &c. committed the wrong complained of, the defendant pleaded that A. B. paid the plaintiff a guinea in satisfaction, and issue thereon; the defendant called A. B. as witness, and Eyre C. J. allowed him to be examined, for what he might prove could not be given in evidence in another action, and in effect he makes himself liable by swearing that he was concerned in the trespass. (3) But if the plaintiff can prove, that A. B.

(1) See Davis v. Living and others, Holt, N. P. C. 275. Emmet v. Butler, 7 Taunt. 607. Ward v. Bourne, stated in vol. ii. Wright v. Paulin, 1 Ry. & Mo. 128.

(2) Gilb. Ev. 117. Bull. N. P. 285.

(3) Peplet v. James, Bull. N. P. 286.

(*j*) See Note 129, p. 142. (*k*) See Note 130, p. 142. (*l*) See Note 131, p. 143.

was concerned in the trespass, and is party to the suit, (which must be shown by producing the original or process against him, and proving an ineffectual endeavour to arrest him, or that the process was lost,) he cannot be admitted a witness for the defendant. (1)(*m*) If nothing is proved against A. B., then he ought to be admitted. (2) (*n*)

Co-defendent pleading bankruptcy.

In an action against several defendants, if one plead his bankruptcy, and the others plead the general issue, the former cannot be admitted to give evidence for the rest, though he may have received his certificate: (3) for, in case of a verdict for the plaintiff, he is liable to the costs of this action. If a *nolle prosequi* had been entered as to the defendant, proposed to be called as witness, that would make him competent. (4) (*o*)

Nolle-prosequi.

Co-defendant submitting and fined.

In a case where one of the defendants, on an indictment for an assault, pleaded guilty, and was fined, and paid the fine, Pratt C. J. allowed him to be witness for another defendant, who pleaded not guilty: he considered the trial as at an end with respect to him. (5)(*p*) And he would be a competent witness against the other defendants. On the trial of an indictment for a conspiracy, a verdict of acquittal may be taken for some of the defendants, at the instance of the prosecutor, before the opening of the case against the rest, and the defendants so acquitted may be called as witnesses for the prosecution. (6) (*q*)

Co-defendant, in indictment, suffering judgment by default.

On a joint indictment against several for a misdemeanor, a defendant, who suffers judgment by default, cannot be a witness for the other defendants. (7) The admission of such evidence, said Lord Ellenborough, might be extended equally to every other criminal case, and thus one of the party, by suffering judgment

(1) Reazon v. Ewbank, Bull. N P. 286. Hill v. Fleming. Rep. temp. Hard. 264. Lloyd v. Williams, ib. 123.

(2) Page v. Crook, Styl. 401 1 Atk. 452.

(3) Raven v. Dunning and another, 3 Esp. N. P C. 25. Currie v. Child and another, 3 Camp. 283, S. P. Emmett v. Bradley and others, 1 Moore, C. P. 332, S. P.

(4) Said by Parke S. to have been so ruled by Le Blanc J. at Lancaster. 1 Moore, 339. 7 Taunt. 607. See also Moody v. King and Porter, 2 Barn. & Cress. 558.

(5) R. v. Fletcher, 1 Str. 633 R. v. Shearman and Idle, Rep. temp. Hard. 303.

(6) R. v. Rowland and others, 1 Ry. & Mod. 402.

(7) R. v. Lafone and others, 5 Esp. N. S. C. 155.

(*m*) See Note 132, p. 144. (*n*) See Note 133, p. 144. (*o*) See Note 134, p. 144. (*p*) See Note 135, p. 145. (*q*) See Note 136, p. 145.

by default, might protect the rest; there is a community of guilt; they are all engaged in an unlawful proceeding; the offence is the offence of all, not of a single individual only. (*r*)

Co-defendant in an action of contract, suffering judgment by default.

In an action on a joint contract against two defendants, where one let judgment go by default, Lord Kenyon refused to admit him, as a witness for the other defendant, to negative the contract; for, if negatived as to one, it fails as to the other, and the plaintiff could not make use of the judgment by default against him. (1)(*s*)

Nor is he a competent witness for the plaintiff, for, if the plaintiff succeeds, he will be entitled to a contribution from the co-defendant, and if the plaintiff fails, he himself will be liable to the whole of the demand. (2) (*t*). In the case of Mant v. Manwaring, (3) the Court of Common Pleas appear to have held, in an action on a joint contract against several partners, that one of the defendants was not competent, for the plaintiff, without the consent of the other defendants, to prove the partnership between himself and them; although he had suffered judgment by default, and had been released by the plaintiff as to all other actions, excepting the one then on trial. (*u*)

Co-defendant in action of tort, suffering judgment by default.

It has been held at nisi prius, in the case of Ward v. Haydon, that a defendant in an action of trover, who suffers judgment by default, may be a witness for the co-defendants, as he is not liable to the costs of the issue tried against the other, and is not himself released, whatever may be the event of that issue. (4) But one who suffers judgment by default, is not a competent witness, in an action of trespass, for the plaintiff, against the co-defendants. In a case of this kind, (5) Mr. Justice Le Blanc said, "The general rule is, that a party to the record is not admissible as a witness; in the case of Ward v. Haydon, the co-defendant was called to *exculpate* the other defendant, here it is proposed to call a co-defendant to *inculpate* the others; the cases, therefore are distinguishable." And he added, that, "when

In trespass.

(1) Brown v. Fox. Ex. Sum. Ass. 1789, M. S. 8 Tannt. 141.
(2) Brown v. Brown and another, 4 Taunt. 752.
(3) 7 Taunt. 139, S. C. 2 Moore, 9.
(4) Ward v. Haydon and another, 2 Esp. E. N. P. 553.
(5) Chapman v. Graves, 2 Campb. 333, n by Le Blanc J.

(*r*) See Note 137, p. 146. (*s*) See Note 138, p. 146. (*t*) See Note 139, p. 146.
(*u*) See Note 140, p. 146.

there had been an innovation in the rule, he was not disposed to extend it." (*v*)

In ejectment

In an action of ejectment against two defendants, a co-defendant, who suffers judgment by default, has been considered a competent witness for the plaintiff to prove the other in possession. (1) Lord Ellenborough held, that the verdict in this case would not prevent the plaintiff from suing the witness for the mesne profits; that the only supposed interest imputable to the witness, is the possibility that the plaintiff will sue the present defendant alone; but this is such a remote interest as cannot render the witness incompetent.

If a material witness for a defendant in ejectment is made a co-defendant, his proper course is to let judgment go by default; but, if he plead, the court will not afterwards upon motion strike out his name. (2) "But in such case," adds Mr. Justice Buller, "if he consent to let a verdict be given against him for so much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant." (3)

Witness made defendant by mistake.

Where a witness for the plaintiff is by mistake made a defendant, the court will on motion suffer his name to be struck out of the record, even after issue joined, and then he may be examined: (4) or, in the case of an information, the attorney general may enter a *nolle prosequi* as to one of the defendants, and so make him a witness. (5)

Sect. III.

Of the Rule on the Subject of Interest, considered with reference to the Husband or Wife of the Party.

General rule.

As a party on the record is not a competent witness, so neither is the husband or wife of the party competent to give

(1) Doe dem. Harrop v. Green and another, 4 Esp. N. C. P. 198.
(2) Dormer v. Fortescue, Bull. N. P. 285.
(3) Bull. N. P. 285.
(5) 1 Sid. 441. Bull. N. P. 285.
(5) Rep. temp. Hard. 163. Bull. N. P. 285.

(*v*) See Note 141, p. 147.

evidence either for or against the party. (1) No other relation is excluded : (2) a father may give evidence for his son, or the son for his father ; and though the relation between them may influence his testimony, it will not render him incompetent. The reason for excluding the husband and wife from giving evidence, either for or against each other, is founded partly on their identity of interest, and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. They cannot be witnesses for each other, because their interests are absolutely the same ; they are not witnesses against each other, because this is inconsistent with the relation of marriage.

Not witnesses *against* each other.

First, the general rule is, that they cannot be witnesses against each other, either in civil or criminal proceedings. It has been resolved, says Lord Coke, (3) that a wife cannot be produced against the husband, as it might be the means of implacable discord and dissension between them, and the means of great inconvenience. In an action brought by a woman as feme sole, the defendant cannot call the plaintiff's husband to prove her married, thereby to nonsuit her. (4)

The husband and wife are not allowed to be witnesses against each other in criminal proceedings, except in certain cases which will afterwards be mentioned. In a prosecution for bigamy, the first husband cannot be admitted to prove the former marriage against the wife ; (5) such evidence would directly criminate, and, therefore, is not admissible for the reason above mentioned. On a trial for murder, the wife of the prisoner cannot be a witness against him. On a prosecution against a woman and others, for a conspiracy in procuring a marriage between her and her husband, the man is not a competent witness against her in support of the prosecution. (6) (*w*)

(1) Co. Lit. 6, (*b*). Hawk. b. 2. c. 46. s. 70. Gilb. Ev. 119. Bull. N. P. 286.

(2) 1 Hale, P. C. 303. 2 Hale, P. C. 276. Hawk. b. 2, c. 46, s. 76. Bull. N. P. 287. 1 Wils. 332.

(3) Co. Lit. 6, (*b*).

(4) Bently v. Cook, cited in R. v. Cliviger, 2 T. R. 265, 269.

(5) Mary Grigg's case, Sir T. Raym. 1.

(6) R. v. Sergeant and others, 1 Ry. & Mo. 352, before Abbott C. J.

(*w*) See Note 142, p. 147.

Evidence *tending* to criminate.

According to the rule laid down in the case of the King against the Inhabitants of Cliviger, (1) a husband or wife ought not to be permitted to give any evidence that may even *tend to criminate* each other. In that case, on an appeal against an order of removal of a pauper and also of a woman as his wife, the respondents having proved the marriage, the appellants called the pauper for the purpose of proving his former marriage with another woman, but he swore directly the reverse; they then called the woman to prove the alleged former marriage. The court of quarter sessions rejected the witness; and the Court of King's Bench determined, that she was not competent to give such evidence. Both Mr. Justice Ashurst and Mr. Justice Grose, the only judges present in court, were of opinion, that a husband and wife are not permitted, from a principle of public policy, to give any evidence that may even *tend to criminate* each other; that the objection is not confined merely to cases where they are *directly accused* of a crime; but, even in collateral cases, if their evidence *tends that way*, it shall not be admitted; for although the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended. (x)

The authorities relied upon, in support of this decision, are a passage from Lord Hale's Pleas of the Crown (2) and the case of Broughton v. Harpur. (3) But the former authority goes no farther than this, that the wife is not *compellable* to give any evidence charging the husband with offence; the passage is, "a woman is not bound to be sworn, or to give evidence against another in case of theft, &c., if her husband be concerned, though it be material against another, and not directly against her husband." In the case of Broughton v. Harpur, where the plaintiff made title to lands as son and heir of A. B. and C. D. his wife, in right of C. D., and the defendant's case was, that A. B. was married to a former wife then living, Gould J. admitted the woman, to whom A. B. was supposed to be married, to prove the former marriage; but afterwards, as the report states, the same cause being tried upon the same title between the same parties, Lord Holt C. J. refused to ad-

(1) 2 T. R. 263.
(2) 2 H. P. C. 301.
(3) 2 Ld. Raym. 752.

(x) See Note 143, p. 147.

mit the former wife, as witness to prove the fact. The note of the case is very short; and it is not stated for what reason the wife was considered incompetent on the second trial. The objection against her competency on the first trial was on the ground of interest; and, although at that time this cause of incompetency was not accurately defined, it is now clearly settled, that such an objection could not be supported, and that it was properly overruled on the first trial. These authorities, therefore, it is evident, do not support the case of the King v. Inhabitants of Cliviger, to the extent to which that case has gone; they certainly do not lead to the conclusion, that husbands and wives are not permitted to give any evidence, in collateral cases, that has *a tendency to criminate* each other.

The one competent to contradict the other in collateral cases.

The rule laid down in the case of the King v. Cliviger was much discussed in a late case, the case of the King against the Inhabitants of All Saints in Worcester, (1) in which the Court of King's Bench was of opinion, that it had been expressed in terms much too general and undefined. That case was as follows: On an appeal against the removal of Esther Newman, otherwise Esther Willis, to the parish of All Saints, as to her maiden settlement, the respondents called a woman of the name of Ann Willis for the purpose of proving this fact, namely, that at a certain time she married one G. Willis. The appellants objected to her competency, alleging that they were prepared to prove his marriage with the pauper at a subsequent time. The quarter sessions admitted the evidence of the witness, who proved her marriage with G. W. about fourteen years ago; and cohabitation between this witness and G. W., as man and wife, was proved by other evidence. The respondents then proved, that the pauper gained a settlement in her own right in the appellant parish, and that she had about three years ago married G. W.; and this marriage was proved as well by the pauper herself, as by a witness present at the time of the marriage. The counsel for the appellants contended, that the evidence of Ann Willis ought to be struck out. But the court of quarter sessions overruled the objection, and stated the case for the opinion of the court of King's Bench. In the course of the argument, which

(1) Easter Term, 1817, May 4, MS.

took place on showing cause against the rule for setting aside the judgment of the court below, the case of the King v. Cliviger was brought into discussion. And after much argument, the Court of King's Bench was of opinion, in the first place, that the case cited (admitting it to its utmost extent) did not show the evidence to be inadmissible at the time that it was offered; for the wife did not contradict the husband, as he had not been examined,—she did not by her evidence directly criminate him, as the proceeding related to other matters, and not to any criminal charge against him—and her evidence could never be used against him, nor be made the groundwork of any future criminal proceeding; the evidence, therefore was unobjectionable when received, and could not properly be expunged. The court were further of opinion, that the rule, laid down in the case of the King v. Cliviger, was too large and general; that the former wife would have been competent to prove her marriage, though the second marriage had been first proved by the respondents; and that even if the second marriage had been proved by the appellants, still she would be competent, and the respondents in reply might have called her to prove the former marriage; for her evidence did not directly criminate the husband, and never could be used against him, nor could he ever be affected by the judgment of the court founded upon such evidence. (*y*).

The result, therefore, appears to be, that, on the trial of an appeal against an order of removal, (and, upon the same principle, in any collateral suit or proceeding between third persons,) a husband or wife is a competent witness to prove a former marriage, even after proof of a second marriage, although, perhaps the witness would not be *compellable* to answer such questions. And the reasoning, upon which this rule is founded, is equally strong to show, that the one may be called as witness to disprove what has been stated by the other; and that either the party who has called the one, or the opposite party, may call the other for the purpose of contradicting. Indeed, the reasoning is much stronger in this case than in the former, where the husband or wife is allowed to prove the first marriage; for although they may directly contradict each other as to a particular fact, it will

(*y*) See Note 144, p. 148.

not follow, that either party has been guilty of perjury. And as the most serious inconveniences might result from a different rule, which would be a bar to the full and complete investigation of the subject, in cases too where the property, the character, or even the life of a party may be at stake, it appears to be reasonable and necessary to the ends of justice, that such evidence should be admitted.

Not competent *for* each other.

Secondly, the general rule is, that neither the husband nor the wife will be allowed to give evidence for each other, in civil or criminal proceedings. (1) (*z*) In a prosecution for larceny, or murder, the one would not be a competent witness for the other. On a prosecution against several persons for a conspiracy, Lord Ellenborough C. J. refused to admit the wife of one of the defendants to be a witness for the others; a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (2) (*a*)

Declarations.

The same reason applies to the declarations of the husband (*b*) or wife. (*c*) Where an action is brought by or against the husband or by the husband and wife jointly in right of the wife, the general rule is, that the declarations of the wife are not evidence against or for the husband. (3) In an action of trespass against a husband and wife, the wife's confession of a trespass, committed by her, cannot be given in evidence against the husband. (4) (*d*) In an action for goods supplied to the defendant's wife, who, as it appeared, lived separate upon an allowance from him, her declarations as to the receipt of the allowance could not be admitted in his favor. (5) * A discourse between the husband and wife, in

(1) Supra, p. 77.
(2) R. v. Locker and others, 5 Esp. N. P. C. 107. 1 Ry. & Mo. 354. R. v. Frederick and another, 2 Str. 1094, S. P.
(3) Winsmore v. Greenbank, Willes, 577. Alban and others v. Pritchett, 6 T. R. 680. Barron v. Grillard, 3 Ves. & Beam. 165. Baker v. Morley, Bull. N. P. 28.
(4) Denn v. White and another, 7 T. R. 112.
(5) Hodgkinson v. Fletcher, 4 Campb. N. P. C. 70.

* In Scholey v. Goodman, (1 Bing. 349,) an action on an agreement, by which the defendant agreed to live separate from his wife, and to pay the plaintiff a certain allowance for the use of his (defendant's) wife, a question arose as to the admissibility of the wife's declarations, to prove that she was living in a state of adultery, during the time for which the allowance was claimed. The point was not decided by the Court.

(*z*) See Note 145, p. 148. (*a*) See Note 146, p. 148. (*b*) See Note 147, p. 149. (*c*) See Note 148, p. 149. (*d*) See Note 149, p. 150.

the presence of a third person, may be given in evidence against the husband, like any other conversation in which he may have been concerned.

Letters.

Letters written by the husband or wife are subject to the same rule as their declarations. In general, letters written by the husband to the wife may be read as evidence against him; but her letters to him would not be evidence for him. (1)

Crim. con.

In an action for criminal conversation with the plaintiff's wife, the wife's letters to the defendant are not evidence for the defendant against the husband, nor is her confession evidence for the husband against the defendant: but conversations between her and the defendant are evidence against him. (2) Evidence of the manner in which the husband and wife used to live together, before her connection with the defendant, is clearly admissible, for the purpose either of increasing or lowering the damages: and upon this principle it has been determined, that, where the husband and wife have lived apart from each other, the letters of the wife to her husband, written before any suspicion of a criminal intercourse, are admissible in evidence, as showing their demeanor and conduct, whether they were living on terms of mutual affection; but, on account of the obvious danger of collusion, it ought to be strictly proved, that the letters, which are offered in evidence, were written at a time when the wife was not suspected of misconduct. (3) (*e*)

Letters of wife to husband.

Action by trustee of wife.

In an action brought by the executrix of a surviving trustee under a marriage-settlement, to recover back the value of certain goods, which had been sold by the defendant, as the sheriff, under on execution against the husband of the *cestuy que trust*, the husband was not admitted to prove, on the part of the plaintiff, that the goods had been conveyed in trust to the plaintiff for the separate use of his (the witness's) wife. (4) In this case, as the witness's debt would have been discharged by a sufficient

(1) Bull. N. P. 28.

(2) Bull. N. P. 28. Winsmore v. Greenbank, Willes, 577.

(3) Edwards v. Crock, 4 Esp. N. P. C. 39. Trelawney v. Coleman, 1 Barn. & Ald. 90. 2 Starkie, N. P. C. 191, S. C.—The cause of their separation was not shown in the latter case. In the former, they were living separate, as servants in different families.

(4) Davis v. Dinwoody, 4 T. R. 678.

(*e*) See Note 150, p. 150.

execution, his evidence would have been in that respect against his personal interest: (1) but on the other hand, it was the wife's interest to have the property secured for her separate use; and though the action was between third persons, yet it directly affected her interest, the action being brought by her trustee for her benefit, and the real point in issue being, whether the goods belonged to her or to her husband. (*f*)

In case of divorce.

This general rule of evidence, which has been adopted for the purpose of promoting a perfect union of interests, and of securing mutual confidence, is so strictly observed, that even after a dissolution of marriage for adultery, the wife is not admitted to give any evidence of what occurred during the marriage, which would have been excluded, if the marriage had continued. (2) This, as Lord Ellenborough has said, is on the ground, that the confidence, which subsisted between them at the time, shall not be violated in consequence of any future separation. Thus one great cause of distrust is removed, by making the confidence, which once subsists, ever afterwards inviolable in courts of law.

Or death.

Upon the same principle, in an action by an executor against a sheriff for a false return to a writ of fi. fa., it has been held, that the widow of the testator cannot be allowed, on the part of the defendant, to give evidence of a conversation between herself and the testator. (3) (*g*)

Or consent.

In a case before Lord Hardwicke C. J., he would not suffer a woman to be a witness, though her husband consented: (4) "the rule," he said, "is for the peace of families, and such consent should never be encouraged." (*h*)

Exceptions.

There are several exceptions, to which the reason of the general rule on this subject does not apply, or where it is outweighed by considerations of higher importance. In the following cases, the one is competent to give evidence against the other. And in all those cases, in which the one is competent to

(1) See Bland v. Ansley, 2 New Rep. 331.
(2) Monroe v. Twisleton, cited in Averson v. Lord Kinnaird, 6 East, 192.
(3) Doker v. Hasler, 1 Ry. & Mo. 198, by Best C. J.
(4) Barker v. Sir Woolston Dixie, Rep. temp. Hard. 264.

(*f*) See Note 151, p. 150. (*g*) See Note 152, p. 151. (*h*) See Note 153, p. 151.

Exceptions.

give evidence *against* the other, the one is equally competent to give evidence *for* the other. (1) (*i*)

In case of forcible marriage.

If a woman is taken away by force and married, she may be a witness against her husband indicted on stat. 3 H. 7, c. 2, for she is not a wife *de jure*, a contract obtained by force having no obligation in law. (2) From this it might appear, that if the actual marriage were valid (as where the woman after the abduction consents to the marriage voluntarily, and not induced by any precedent menace,) her evidence ought not to be allowed. (3) But it is said to have been ruled, upon debate, that a wife is a competent witness for as well as against her husband, on the trial of an indictment on this statute, although she has cohabited with him from the day of her marriage. (4) (*j*)

In case of bigamy,

On an indictment for a second marriage during the continuance of a former marriage, though the first wife cannot be a witness, (5) yet the second wife may, after proof of the first marriage. (6) After such proof, she would be competent to give evidence for as well as against the prisoner. (7).

In prosecution for personal violence.

A wife may be a witness on the prosecution of her husband for an offence committed against her person. This was determined by all the judges present, on Lord Audley's trial, (8) and has been since confirmed by the highest authority, (9) on every principal of humanity and justice. In Azayr's case, on an indictment against a man for beating his wife, Lord Raymond suffered her to give evidence. (10)(*k*) In such cases, as the wife is a

(1) Gibbs C. J., in R. v. Perry, and Abbott C. J., in R. v. Serjeant and others, 1 Ry. & Mo. 354.

(2) Swendsen's case, 5 St. Tr. 465. fol. ed. S. C. 14 Howell's St. Tr. 575. Bull. N. P. 286. Ramsay's case, cited Rep. temp. Hard. 83. 1 Hale, P. C. 302, 661.

(3) 1 Hale, P. C. 302. 4 Bl. Com. 209, contra.

(4) R. v. Perry, 1794. Hawk. P. C. b. 1, c. 40. § 13. The wife was there called *for* her husband. See this case mentioned by Abbott C. J., in R. v. Serjeant, 1 Ry. & Mo. 354.

(5) Mary Grigg's case, Sir T. Raym. 1. Hawk. b. 2, c. 48, s. 71.

(6) Hale, P. C. 393. Bull. N. P. 287. 1 East, P. C. 469.

(7) See 1 Ry. & Mo. 354.

(8) 1 St. Tr. 393. fol. ed. S. C. 3 Howell's St. Tr. 413. Hutton, 116.

(9) 1 Hale, P. C. 301. Hawk. b. 2, c. 46, s. 77. Probyn J., in Rep. temp. Hard. 83. Bull. N. P. 287. 1 Bl. Comm. 448. Doubted in Grigg's case, Sir T. Raym. 1, and in Gilb. Ev. 120.

(10) 1 Str. 633; Bull. N. P. 287, S. C. Jagger's case, 1 East, P. C. 454.

(*i*) See Note 154, p. 151. (*j*) See Note 155, p. 151. (*k*) See Note 156, p. 152.

competent witness against the husband, so also is she a competent witness for him. (1) Exceptions.

A wife is permitted to exhibit articles of the peace against her husband : (2) and the court will not receive affidavits on the part of the defendant, to contradict the truth of the articles exhibited against him, and prevent his giving surety. (3) So, an affidavit of a married woman has been admitted to be read, on an application to the Court of King's Bench for an information against her husband, for an attempt to take her away by force after articles of separation : (4) and it would be strange, says Mr. Justice Buller, to permit her to be a witness to ground a prosecution, and not afterwards be a witness at the trial. (5) Articles of peace.

On the trial of a man for the murder of his wife, her dying declarations are evidence against him; (6) (*l*) they are evidence also for him. It has been said that a wife may be a witness against her husband in a case of high treason : (7) but there are authorities the other way. (8) (*m*) Dying declarations. Treason.

Where the wife has acted for the husband in his business, and by his authority and consent, he adopts her acts, and will be bound by any admission or acknowledgment made by her respecting that business. (*n*) Thus, where the wife has made a contract for her husband, which has been adopted by him, her acknowledgment as to the amount of the money due will be evidence against him. (9) In the case of White v. Cuyler, which was an action of assumpsit by a servant for wages, the plaintiff was allowed to give in evidence a deed executed by the wife of the defendant at the time of the hiring, which, though void as a deed, was admitted in order to show the terms of the contract. (10) And in a late case, in an action of assumpsit for Declaration of wife acting for husband.

(1) See 1 Ry. & Mo. 354.
(2) Bull. N. P. 287.
(3) Lord Vane's case, 2 Str. 1202, more fully stated from Mr. Ford's MS. in 13 East, 171, n. (a) ; R. v. Doherty, ib. S. P.
(4) Lady Lawley's case, Bull. N. P. 287. Mary Mead's case, 1 Burr. 543.
(5) Bull. N. P. 287.
(6) Woodcock's case, 2 Leach, Cr. C. 563. John's case, 1 East, P. C. 357.
(7) Dictum in Grigg's case, Sir T. Raym. 1, cited in Gilb. Ev. 119, and in Bull. N. P. 289.
(8) Brownlow, 47.
(9) Emerson v. Blonden, 1 Esp. N. P. C. 142. 1 Str. 527. Bull. N. P. 287. Anderson v. Saunderson, Holt, N. P. C. 591.
(10) White v. Cuyler, 6 T. R. 176.

(*l*) See Note 157, p. 152. (*m*) See Note 158, p. 152. (*n*) See Note 159, p. 152.

Exceptions.

goods sold and delivered at the defendant's shop, an offer by the wife to settle the demand was admitted in evidence, as she used to serve in the shop, and was in the habit of transacting the business in his absence. (1) Upon the same principle, the wife's acknowledgments, as to a debt being due for goods furnished with her husband's consent for her accommodation, or for goods purchased by her for the husband, and used by him, have been held to be sufficient to take the case out of the statute of limitations. (2) * (*o*)

Examination of bankrupt's wife.

By stat. 21 J. 1, c. 19, s. 5 & 6, which recites, that doubts had arisen upon the point, it is provided, "that after the party is declared a bankrupt, the commissioners may examine his wife on oath, for the finding out of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of by such wife, in her own person, or by her act or means, or by any other person." Before this statute, the commissioners could not examine the bankrupt's wife. (3) The same power is given by the new bankrupt law. (4)

Appeal to order of bastardy.

Upon an appeal against an order of bastardy, in the case of a married woman, Lord Hardwicke and other Judges held, that she was a competent witness to prove her criminal connection with the appellant, though her husband was interested both in the question and in the event of the appeal; because such a fact, so secret in its nature, can scarce ever be proved by other

(1) Clifford v. Burton, 1 Bing. 199. 8 Moore, 16.

(2) Gregory v. Parker, 1 Campb. 394. Palethorp v. Furnish, 2 Esp. N. P. C. 511, n. Anderson v. Saunderson, Holt, N. P. C. 591. 2 Starkie, N. P. C. 204, S. C. And see 15 Ves 459. The cases here cited appear to have overruled the case of Hall v. Hill, 2 Str. 1094, where, in an action of assumpsit brought by the husband for wages earned by his wife, the acknowledgment by the wife, as to her having been paid by the defendant, was not allowed to be evidence.

(3) Anon. case, 1 Brownlow, 47.

(4) 6 G. 4, c. 16, s. 37.

* In the case of Carey v. Adkins (*a*) (an action against an officer of police, to recover money which he had taken from the plaintiff's wife on suspicion of her having got it unlawfully), Lord Ellenborough admitted the account given by her, respecting the money, on her examination before a magistrate, to be given in evidence on behalf of the defendant: "the money," said Lord Ellenborough, "appears never to have been in the husband's possession, and, as the wife had the exclusive custody and management of it, he must be bound by what she said concerning it."

(*a*) 4 Campb. 94.

(*o*) See Note 160, p. 152.

evidence. (1) And by a parity of reason, said Lord Ellenborough in the case of the King v. Luffe, it should seem, if she be admitted as a witness of necessity, to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove, that the adulterer alone had that sort of intercourse with her, by which a child might be produced within the limits of time which nature allows for parturition. But this is only from the necessity of the thing: she is not competent to prove any other fact, as want of access, (2) other witnesses may be reasonably supposed capable of proving. She cannot prove want of access even after the husband's death. (3) This rule is founded on the broad principle of public policy, independently of any possible motives of interest in the particular case. (4) (*p*)

Exceptions.

Adultery.

Non-access.

On the appeal against the removal of a woman, as the widow of A. B. deceased, prima facie evidence of the marriage having been produced on the part of the respondents, the Court of King's Bench determined, that the woman was a competent witness, on the part of the appellants, to disprove the marriage. (5)

Appeal against order of removal.

A wife may be a witness, in an action between third persons not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand: as, in an action between third persons for goods sold and delivered, to prove that the goods had been sold not on the credit of the defendant, but on her husband's credit. (6) This evidence, it may be said, was in some measure against the husband, though he was not a party in the suit. On the other hand, to reject her evidence in such a case would be a hardship on the defendant, who may have no other means of defending himself against an unjust demand: and, though upon her testimony the defendant might have a verdict, and an action might afterwards in consequence be brought against the husband, she would not then be

Action between third persons.

(1) R. v. Reading, Rep. temp. Hardr. 82. R. v. Bedell, Andr. 8 Gilb. Ev. 139. R. v. Luffe, 8 East, 285.
(2) Ante, p. 80, (3) R. v. Rooke, 1 Wils. 340. R. v. Kea, 11 East, 132.
(3) R. v. Kea, 11 East, 132.
(4) 11 East, 132. 8 East, 202.
(5) R. v. Bramley, 6 T. R. 330. R. v. St. Peter's, Burr. Sett. Cas. 25, S. P.
(6) Williams v. Johnson, by King C. J. 1 Str. 504. Bull. N. P. 287, S. C. Vid. ante, p. 85.

(*p*) See Note 161, p. 153.

admitted as witness, nor could her evidence in the first suit be produced against him.

In an action of trover by a carrier, for a box, which had been delivered to the defendant by mistake, the plaintiff called the owner's wife to prove what the box contained; but Holt C. J. refused to hear her testimony, on the ground that the verdict in that action, with oath of what the carrier's witness swore, might be given in evidence to prove the value of the goods in a subsequent action brought by the husband against the carrier. (1) But it seems questionable, how the verdict in this cause could be afterwards used as evidence by the husband; and the husband appears not to be immediately interested in the event of the carrier's action; for whether the plaintiff succeed or fail, he would be equally liable to the owner of the goods. (*q*)

Evidence of a woman living with the party as wife.

In the case of Campbell v. Tremlow, (2) which came before the Court of Exchequer, on a motion to set aside an award, one of the grounds of the application was, that the arbitrator had rejected the evidence of a woman called on the part of the plaintiff, who had cohabited with him for several years, and passed as his wife, but who would have stated, that she had never been married to him. The point was much argued at the bar. The court, considering it a doubtful question (as the report states), declined giving any opinion, as it was unnecessary for the determination of the case: and they refused the motion, on the ground, that the opinion of the arbitrator was final and conclusive, all matters both of law and fact having been left to his decision. The Lord Chief Baron Richards cited a case, before Lord Kenyon on the Chester circuit in the year 1782, where, on a trial for forgery, the prisoner called a woman as his witness, whom he had himself in court represented to be his wife, but afterwards, on hearing an objection taken to her competency, denied that she was married to him, and Lord Kenyon would not permit him to call her, after having represented her as his wife. (*r*)

(1) Tiley v. Cowling, Lord Raym. 744. Bull. N. P. 243. In the case of Davis v. Dinwoody, before cited, p. 82, the action was between third parties; but there the plaintiff sued for the benefit of the wife, though the husband was not a party to the suit.

(2) 1 Price, 81.

(*q*) See Note 162, p 153. (*r*) See Note 163, p. 153.

Sect. IV.

Of the effect of Admissions by a Party to the suit, or by his Agent, against the Party's Interest. (*s*)

The statements and representations of parties to a suit, made by them against their interest, are evidence against them (*t*) and in many cases they will be the strongest evidence. Upon this principle, the free admissions of one of the parties to a suit on the matter in issue, and the voluntary confessions of a prisoner under a criminal charge, are always received in evidence against the person who made them.

First, with respect to admissions.

Admission by a party to suit.

Admissions by a party to the suit against his interest are evidence in favor of the other side, whether made before or after the commencement of the action, (*u*) whether in writing (*v*) or by parol. The recital of a fact in the counterpart of an indenture is evidence against the party by whom the deed is executed. (1) (*w*) So, a grant to a corporation by a certain name is evidence, against those claiming under the grantor, that the corporation was at the time known by that name. (2) Answers in Chancery are evidence in trials at law, against the party that made them; (3) (*x*) and very strong evidence as they are delivered in upon oath. The examination of a party, taken before commissioners of bankrupt, is evidence against him, although the questions may have been improperly put to him with a view to the action (4), and though he might have demurred to them as subjecting him to penalties. (5) (*y*)

Admission by guardian of party not evidence.

The declarations of a guardian are not admissible in evidence against a minor, who sues by his guardian. (6) And the infant's answer in Chancery by his guardian cannot be read as evidence

(1) Burleigh v. Stibbs, 5 T. R. 465.
(2) Mayor, &c. of Carlisle v. Blamire, 8 East, 493.
(3) Bull. N. P. 237. Doe dem. Digby v. Steel, 3 Campb. 115.
(4) Stockfloth v. De Tastet, 4 Campb. 10.
(5) Smith v. Beadnell, 1 Campb. 30.
(6) Cowling v. Ely, 2 Starkie, N. P. C. 366, by Abbott C. J. Webb v. Smith, 1 Ry. & Mo. 106.

(*s*) See Note 164, p. 153. (*t*) See Note 165, p. 154. (*u*) See Note 166, p. 159. (*v*) See Note 167, p. 159. (*w*) See Note 168, p. 160. (*x*) See Note 169, p. 161. (*y*) See Note 170, p. 161.

against the infant (1) (*z*); it is not in reality the answer of the infant, but of the guardian; for the guardian only is sworn; and the guardian has authority to sue for the infant's benefit, not for his prejudice. We have before seen, that the guardian is not himself competent to give evidence, being liable to the costs of the suit (2); and for this reason, in one case, his declarations were improperly admitted. (3)

By nominal party.

Admissions are evidence in favor of the other side, whether made by the real party on the record, or by a nominal party who sues as a trustee for the benefit of another, (4) (*a*) or whether made by the party who is really interested in the suit, though not named on the record. (5) (*b*) The following examples will illustrate the several parts of this rule.

By party suing for benefit of another.

In the case of Bauerman and another v. Radenius, (6) which was an action by the shippers of goods against the captain of a ship, for not delivering the goods in proper condition, a letter written by the plaintiffs was given in evidence on the part of the defendant, in which they entirely exculpated the defendant from all misconduct; and it appeared also from the letter, that the goods were shipped on the risk of third persons, and that the plaintiffs were not really interested in the suit: the counsel on the other side contended, that the parties really interested ought not to be concluded by the admission of the plaintiffs, who were merely nominal parties in the action: Lord Kenyon was of a different opinion, and the plaintiffs were nonsuited. The Court of King's Bench afterwards affirmed the nonsuit. Mr. Justice Lawrence on that occasion said, "Van Dyck and Co., the persons on whose risk the goods were shipped, are in this difficulty; the present plaintiffs either have or have not an interest; but it must be considered that they have an interest, in order to support the action; and if they have, an admission made by them, that they have no cause of action, is admissible evidence. I have looked into the books, to see if I could find any case in which

(1) By the opinion of all the judges of K. B. and C. P. in Eccleston v. Petty. Carth. 79. Gilb. Ev. 44. 3 P. Will. 237. n. (E.)
(2) See ante, p. 59.
(3) James v. Hatfield, 1 Str. 547.
(4) Bauerman v. Radenius, 7 T. R. 664. Craib v. D'Aeth, ib. 670, n.
(5) R. v. Hardwick, 11 East, 578, 589.
(6) 7 T. R. 664.

(*z*) See Note 171, p. 162. (*a*) See Note 172, p. 163. (*b*) See Note 173, p. 167.

it has been holden, that the admission of a plaintiff on the record is not evidence, but have found none." *

By person interested, though not party on the record.

In an action of debt upon a bond conditioned to pay money to L. D., for whose benefit the action was brought, the defendant proved, that L. D. had said in a conversation respecting this bond, that the defendant owed nothing; upon which the jury found for the defendant. On a motion for a new trial, it was argued, that the declarations of L. D., who was not a party to the action, ought not to affect the plaintiff, and affidavits were offered to explain L. D.'s evidence; but the court said, that the affidavits were inadmissible, and that the case was to be considered, as if L. D. was the plaintiff, the action being for L. D.'s benefit. (1)

By rated inhabitant.

In an appeal against the removal of a pauper, declarations by a rated inhabitant of either parish, concerning the facts in issue, have been adjudged to be admissible in evidence against the other rated inhabitants of his parish: (2) on the ground that the rated inhabitants are the parties directly and immediately interested in the event of the proceeding, although the appeal is entered in the names of the parish-officers. (3) (*c*)

By petitioning creditor.

Upon the same principle, declarations by the petitioning creditor of a bankrupt (who is also assignee under the commission,) are admissible in an action against a sheriff, the assignees having given instructions for the defence, and thus appearing to be the real parties to the action. (4)

By owner of ship.

So, in an action by the

(1) Hanson v. Parker, 1 Wils. 257. Davis v. Dinwoody, supra, p. 82.

(2) R. v. Hardwick, 11 East, 578. R. v. Whitley Lower, 1 Maule & Selw. 636.

(3) 11 East, 589. R. v. Woburn, 10 East, 395. These cases were decided before the st. 54 G. 3. c. 170.

(4) Dowden v. Fowle, 4 Campb. 38. Young v. Smith, 1. Esp. N. P. C. 121.

* In the nisi prius case of Davis v. Ridge and others, 3 Esp. N. P. C. 101., which was an action by a judgment-creditor of P. P. on an award, and for money received by the defendants as trustees of P. P., Lord Eldon is reported to have ruled, that admissions by one of the trustees, of his having money of the trust-estate in his hands, were not binding upon the others, the defendants being only trustees, and not all personally liable. And in an action by the Corporation of London v. Long, 1 Campb. 22., where the question related to the powers of a city-officer, Lord Ellenborough is said to have held, that the declarations of an indifferent individual of the corporation were not admissible, but that he would admit what the officer himself had been heard to say upon the subject.

(*c*) See Note 174, p. 168.

master of a ship for freight, the declarations of the owner of the ship are admissible against the plaintiff, as the action is brought for the owner's benefit. (1)

By person interested in policy.

An action upon a policy may be brought in the name of the person who effected it, though he be not the person actually interested; yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are admissible in evidence against the plaintiff, and what would be a defence against them as in many instances a defence against the plaintiff. (2)

By partner, party to the suit.

It appears to be a general principle, that, in a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him in the suit. (3) In an action of covenant against two defendants, the affidavit of one of them may be given in evidence against both. (4) So, in an action by several partners against the defendant for the non-performance of an agreement, a declaration by one of the partners suing, that the goods, to which the agreement related, were his separate property, is evidence against all the plaintiffs suing as upon a joint contract. (5) In an action against persons as partners, the partnership being first proved, an admission by one of the defendants is admissible against all. (6) And an admission by one defendant of his partnership with the co-defendants, who were sued with him as acceptors of a bill of exchange, and who had been outlawed, has been received as proof against him of a joint promise by all. (7) (*d*)

By partner, not a party.

The rule with regard to the admissions of partners has been extended still further. In an action by a creditor against some

(1) Smith v. Lyon, 3 Campb. 465. See Harrison v. Vallance, 1 Bing. 45, which was decided on the authority of the cases above cited, but seems to be a much stronger case.

(2) By Lord Ellenborough, in Bell v. Ansley, 16 East, 143. See also the case of Duke v. Aldridge, cited by counsel in Bauerman v. Radenius, 7 T. R 665.

(3) 11 East, 589.

(4) Vicary's case, Gilb. Ev. 51.

(5) Lucas and others v. De la Cour, 1 Maule & Selw. 249.

(6) Nicholls v. Dowding and Kemp, 1 Starkie, N. P. C. 81.

(7) Sangster v. Mazarredo and others, 1 Starkie, N. P. C. 161.

(*d*) See Note 175, p. 170.

of a partnership firm, one of whom pleaded his certificate, and the plaintiff entered a *nolle prosequi* as to him, the answer of this partner to a bill filed against him by other creditors was received as evidence against the defendants, not indeed to prove the partnership, but, that being established, as an admission against those, who were as one person with him in interest. (1) And the admission of a partner, though not a party to the suit, is evidence against another partner, who is sued as to joint contracts during the partnership, whether made after the determination of the partnership (*e*) or before. (2) (*f*) But the statement of one who has been admitted into partnership subsequently to the transaction in question, is clearly not admissible in evidence as to such antecedent transaction. (3)

By joint debtor not a party.

In Whitcomb v. Whiting, (4) which was an action on a joint and several promissory note, given by the defendant and others, to which action the defendant pleaded the general issue and the statute of limitations, the Court of King's Bench determined, that proof of payment of interest and part of the principal within six years, by one of the others, who was not sued, would take the case out of the statutes. Lord Mansfield said, "payment by one is payment by all, the one acting virtually as agent for the rest: and in the same manner, an admission by one is an admission by all." The payment or acknowledgment in this case, it is to be observed, was made by one who was jointly liable with the defendant, and originally liable. (5) In the recent case of Parham v. Raynal, (6) the decision in that of Whitcomb v. Whiting has been reconsidered and confirmed. (*g*)

Admission by co-trespasser.

Such is the rule respecting admissions in the case of joint contracts, or where several persons have one and the same interest in the subject matter. But the same rule cannot be applied to actions of trespass or to criminal proceedings. In an action of trespass against several defendants, an admission by one of the defendants is not evidence against the others to prove the fact of their being co-trespassers; and, even where that fact is

(1) Grant v. Jackson, Peake, N. P. C. 203, by Lord Kenyon C. J. See Thwaites v. Richardson, Peake, N. P. C. 16.

(2) Wood and others v. Braddick, 1 Taunt. 104.

(3) Catt v. Howard, 3 Stark. N. P. C. 5.

(4) 2 Doug. 661.

(5) See 1 Barn. & Cress. 169. 2 Barn. & Cress. 29.

(6) 2 Bing. 306.

(*e*) See Note 176, p. 173. (*f*) See Note 177, p. 174. (*g*) See Note 178, p. 174.

fully established, it seems very doubtful whether any admissions or declarations made by one of the defendants, as to the joint motives or designs of the party, can be received as evidence against the others, except so far as they accompany the act, or may be considered as forming a part of the transaction. The rule has in one case been laid down incidentally with greater latitude, and it has been said, (1) that although an admission by one of several defendants in trespass will not establish the others to be co-trespassers, yet, "if that is proved by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object." Perhaps, on consideration, it may appear that the rule is to be understood with some limitation; and from analogy to the principle established by the greatest authorities in cases of conspiracy, the true limitation of the rule appears to be this, that such declarations only are admissible as have been made with reference to a concerted plan, and in pursuance of a common object; and that declarations which have not been made with reference to that object, and are not strictly a part of the transaction in question, cannot be admitted as evidence against co-trespassers. (*h*)

Acts and declarations of co-conspirators.

Acts.

In prosecutions for conspiracies, it is an established rule, that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of law, as well as in sound reason, the act of the whole party: and, therefore, the proof of such act will be evidence against any of the others, who were engaged in the same general conspiracy, without regard to the question, whether the prisoner is proved to have been concerned in that particular transaction. This kind of evidence was received on the trial of Lord Stafford and of Lord Lovat, on the trials for high treason at the Old Bailey in 1794, and in the case of Stone in 1796: in which last case the rule was completely settled.

(1) By Lord Ellenborough, R. v. Hardwick, 11 East, 585.

(*h*) See Note 179, p. 176.

In that case (1), evidence having been given, which warranted the jury to consider, whether the prisoner was engaged in a conspiracy for treasonable purposes, it was determined, that a letter, written by one of the conspirators in pursuance of the common design (although the letter had not been traced into the hands of the prisoner, or to his knowledge), was admissible in evidence, as the act of the prisoner himself. The acts of the several conspirators, who are engaged with the prisoner in one common object, are evidence against him, though he may not have been directly a party to them; they are evidence, as acts connected and in conformity with his own acts. "He who plans the thing," said Mr. Justice Bayley, in his charge to the grand jury in Watson's case, "or who devises the means by which it is to be effected, or draws in others to co-operate, or does any other act preparatory to the execution of the thing proposed, is as much a principal as he who executes that thing: and provided a man once comes into the common purpose and design, every previous act done with a view to that purpose and design, and every subsequent act, is as much his act, as if he had done it himself." (2)

Declarations by co-conspirators.

Letter.

The same rule, subject to the same limitations, must apply to the declarations of conspirators, as well as to their acts. Any declarations made by one of the party, in pursuance of the common object of the conspiracy, are evidence against the rest of the party, who are as much responsible for all that has been said or done by their associates in carrying into effect the concerted plan, as if it had been pronounced by their own voice or executed by their own hand. These declarations are of the nature of acts: they are, in reality, acts done by the party; and generally they are far more mischievous than acts, which consist only in corporal agency. All consultations, therefore, carried on by one conspirator, relative to the general design, and all conversations in his presence, are evidence against another conspirator, though absent. What the effect of such

Declarations.

(1) R. v. Stone, 6 T. R. 527. 1 East, P. C. 97, 98. 25 Howell's St. Tr. 1311. S. C. Hardy's Trial, 24 Howell's St. Tr. 437. 451. 700. Horne Tooke's Trial, 25 Howell's St. Tr. 127. 243. Stone's case, ib. 1268—1276. 1311.

(2) Watson's case, 32 Howell's St. Tr. 7. Brandreth's case, 32 Howell's St. Tr. 854. 857. Bedford v. Birley, 3 Stark. N. P. C. 85.

Declarations by co-conspirators.

evidence will be, as C. J. Eyre observed, on the discussion of a question of this kind in Hardy's trial (1), must depend on a variety of circumstances, such as, whether he was attending to the conversation, whether he approved or disapproved: but still such conversations are admissible in evidence.

Hardy's case.

A question arose on the trial of Hardy (2), as to the admissibility of a letter written by one of the conspirators to another person in a distant part of the kingdom, who was also proved to be party in the same conspiracy. This was a letter written by the chairman of a meeting in London to a delegate sent by that meeting into Scotland, though not received by him: it was stated to contain encouragement to him to proceed in the cause in which he was engaged by the direction of the meeting in London, and that meeting was proved to have been composed, among others, of the prisoner, the writer of the letter, and the person to whom it was addressed. All the judges held the letter to be admissible, excepting the Lord Chief Justice Eyre, who thought it could not be admitted against the prisoner, as it had not been received by the person to whom it was written, and might, perhaps, never have gone out of the writer's hands. But the other judges were of opinion, that the letter, being addressed by one conspirator to another conspirator, and having relation to the conspiracy (not merely a bare description to a stranger,) this was a complete act in that single conspirator, and the letter, therefore, ought to be read against the prisoner, as showing the nature and tendency of the conspiracy, though the letter should be intercepted, and though it should never reach the person for whose perusal it was intended.

Watson's case.

In the late trial of Watson (3), some papers containing a variety of plans and lists of names, which had been found in the house of a co-conspirator before the apprehension of the prisoner, and which had a reference to the design of the conspiracy, and were in furtherance of the plot, were held to be admissible evidence against the prisoner: all the judges were of opinion, that these papers ought to be received, there being in

(1) 24 Howell's St. Tr. 704.
(2) 24 Howell's St. Tr. p. 453—477. 2 Starkie, N. P. C. 140.
(3) 32 Howell's St. Tr. 348, 350.

this case strong presumptive evidence, that they were in the house of the co-conspirator before the prisoner's apprehension, and in the same state, in which they were afterwards found; and that this circumstance very materially distinguished the present case from Hardy's case, (cited by the prisoner's counsel,) where the papers were found after the prisoner's apprehension in the possession of persons, who possibly might not have obtained the papers till afterwards; whereas, in the present case, the room, in which the papers were found, had been locked up by one of the conspirators.

Declarations by co-conspirators.

A question also arose, in the same case (1), as to the admissibility of another paper, found among those before mentioned, which contained written questions and answers of a description calculated to excite mutiny in the army; one objection to this evidence was, that such a written paper could not be admitted, as there had been no proof of its ever having been printed or proposed to be printed, or that any attempt had been made to circulate it; and Sidney's case was cited as an authority. But the judges held, that the case then before them was clearly distinguishable from Sidney's case; and Mr. Justice Abbott particularly stated, that the paper, in that case, was not only an unpublished paper, but appeared to have been composed several years before the crime was supposed to have been committed, and that the true objection was, not that the paper was unpublished, but that it had no reference to the treasonable practices charged in the indictment. The paper, produced in Watson's case, was afterwards withdrawn by the Attorney-General, on account of some doubt expressed by the Court, whether it had been clearly proved, that the paper in question was intended to have been used in furtherance of the common purpose.

Watson's case.

What one of the party may have said, not in furtherance of the plot, but as a mere relation of some past transaction, or as to the share which some of the others have had in the execution of the common design, cannot, it is conceived, be admitted in evidence to affect other persons. On the trial of Hardy, for

Declarations not connected with general plan.

(1) 32 Howell's St. Tr. 858. 2 Starkie, N. P. C. 141.

Declarations by co-conspirators.

Letter. Hardy's case.

high treason (1), a question arose as to the admissibility of a letter written by Thelwall, and sent to a third person not connected with the conspiracy, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which society the prisoner and the writer of the letter were proved to be members. The argument in favor of the evidence was, that the letter was an act done in furtherance of the conspiracy; the objection was, that the letter contained merely a relation by the writer, that certain songs had been sung, which could not be evidence against the prisoner. The majority of the Court decided against the admissibility of the letter. The Lord Ch. Justice Eyre, the Lord Chief Baron Macdonald, and Mr. Baron Hotham were of opinion, that the letter could not be received. Mr. Justice Buller (with whom Mr. Justice Grose agreed, in thinking it admissible), said, the letter ought to be received in evidence, for the purpose of shewing what was the nature and extent of the conspiracy; that in Damaree's and Purchase's cases, evidence was received of what some of the parties had done, when the prisoner was not there; that on the trial of Lord Southampton, something said by Lord Essex, previous to the prisoner's being there, was admitted as evidence; and that, in Lord George Gordon's case, evidence of what different persons of the mob had said, though he was not there, had been admitted. But the Lord Chief Justice Eyre, and the other judges, considered the letter, not as an act done in prosecution of the plot, but as a mere narrative of what had passed. "Correspondence," said the Chief Justice, "very often makes a part of the transaction, and in that case the correspondence of one who is a party in a conspiracy would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what had been done, appears a different thing." And with respect to the cases alluded to by Mr. Justice Buller, the Ch. Justice observed, "In the cases of Damaree, and Lord George Gordon, the cry of the mob at the time made a part of the fact, part of the transaction, and therefere such evidence might properly be received." (*i*)

(1) 24 Howell's St. Tr. 452. 475. See 32 Howell's St. Tr. 351.

(*i*) See Note 180, p. 177.

The statement or representation of an agent in making an agreement, or in doing an act within the scope of his authority, is evidence against the principal himself, and equivalent to his own acknowledgment (1): for what the agent says may be explanatory of the agreement, or determine the quality of the act which it accompanies, and must therefore be as binding on the principal, as the act or agreement itself. To prove such a representation, the opposite party is not obliged to call the agent, but may establish it by other evidence. Thus, what an agent says at the time of a sale, which he is employed to make, is evidence as part of the transaction of selling; but the principal is not bound by the representation of the agent at another time. (2) The statement of an agent.

In the case of Biggs v. Laurence, (3) which was an action for goods sold and delivered, Mr. Justice Buller admitted a written paper, by which the defendant's agent acknowledged the receipt of the goods, as evidence against the principal; and on that evidence the plaintiff recovered. However, it was on one occasion stated by counsel in argument (4), that Lord Kenyon since that case had frequently ruled the contrary, without its ever having been questioned; and this statement seems to have been acquiesced in by Lord Kenyon (5), who said, "that it was not the point, upon which the case was afterwards argued or determined, on the motion for a new trial," meaning the point, that such a receipt could be admitted in evidence. It does not appear from the case of Biggs v. Laurence, whether the agent's acknowledgment, of having received the goods, was made at the time of delivery, or on what other occasion: though, upon this fact, according to the cases above cited, particularly the case of Fairlie v. Hastings, in which the subject was fully discussed by the Master of the Rolls, the admissibility of such evidence may be found materially to depend.

(1) See the judgment of Sir W. Grant, Master of the Rolls, in Farlie v. Hastings, 10 Ves. 127., and 4 Taunt. 519.

(2) Helyar v. Hawke, 5 Esp. N. P. C. 74. Peto v. Hague, 5 Esp. N. P. C. 135. Alexander v. Gibson, 2 Campb. 555. Palethorp v. Furnish, 2 Esp. N. P. C. 511. n. See also Kent v. Lowen, 1 Campb. 177. 180. Prideaux v. Collier, 2 Starkie, N. P. C. 57. Drake v. Marryat, 1 Barn. & Cress. 473.

(3) 3 T. R. 454.

(4) Bauerman v. Radenius, 7 T. R. 665.

(5) See 10 Ves. 128.

Statement of agent.

In one case, indeed (1), Lord Kenyon C. J. is said to have refused to admit an agent's letter as evidence of an agreement against the principal, holding, that the agent himself ought to be examined. "If the agreement," said the Master of the Rolls (2), adverting to this case, "was contained in the letter, I should have thought it sufficient to prove that the letter was written by the agent: but if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." And the Court of Common Pleas has determined, after much argument, in the cases of Kahl v. Jansen (3), and Langhorn v. Allnut (4), that the letters of an agent abroad to his principal, containing a narrative of the transaction in which he had been employed, were not admissible in evidence against the principal, as the mere representation of the agent. The general rule on the subject was there fully recognized and confirmed. "When it is proved," said the Chief Justice, "that A. is agent to B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract, which he makes for B., and which therefore binds him, but it is not admissible as the agent's account of what passes." (5) Such declarations are admitted in evidence, not for the purpose of establishing the truth of the fact stated, but as representations, by which the principal is as much bound as if he made them himself, and which are equally binding, whether the fact stated be true or false.

Letter by clerk.

A letter written by a clerk, whose business it is to write in the name of his employer, will have precisely the same effect, as if written by the principal himself. Thus, a letter from the defendant's clerk, informing the plaintiff, that a policy had been effected, was held to be good evidence of the existence of the policy; and the defendant was not allowed to prove that the letter had been written by mistake, and that the policy had not been made. (6)

Reference to third person.

If one party refers to another, for information on a disputed fact,

(1) Maesters v. Abraham, 1 Esp. N. P. C. 375.
(2) 10 Ves. 127.
(3) 4 Taunt. 565.
(4) 4 Taunt. 511. Reyner v. Pearson, 4 Taunt. 663. S. P.
(5) 4 Taunt. 519.
(6) Harding v. Carter, Park. Ins. 4.

to a third person as authorised to answer for him (1), or employs an agent to make certain propositions respecting a transaction between himself and another (2), he is bound by what his agent says or does within the scope of his authority, as much as if it had been done or said by himself. Thus, for example, in an action for goods sold and delivered, where it appeared at the trial, that in a conversation between the plaintiff and defendant, the former asserted that he had delivered the goods by one C., and the defendant replied, "If C. will say, he did deliver the goods, I will pay for them," the plaintiff was allowed to give in evidence C.'s answer respecting the matter referred to him. (3). Statement of Agent.

In the case of Fabrigas v. Mostyn, a point arose, which may serve as another example to illustrate the rule here laid down. (4) There, a witness who had been employed by the defendant to convey certain proposals to the plaintiff, explained them to him by an interpreter, from whom also he received the answer: the question was, whether the words of the interpreter could be given in evidence by the witness, as the answer of the plaintiff: or whether the interpreter himself ought to be called, as the witness understood neither the questions put to the plaintiff, nor the answer made by him. But Mr. Justice Gould ruled, that the evidence of the witness was clearly admissible, and sufficient. Here the interpreter was the accredited agent of the parties, acting within the scope of his authority, and in the execution of his agency. (*j*)

It must be be remembered, that the cases, in which the declarations of an agent have been admitted against the principal, are exceptions to that general rule, which requires evidence to be given upon oath: and the exception is confined to such statements, as are made by him, either at the time of his making an agreement about which he is employed, or in acting within the scope of his authority. "Except in one or the other of these ways," said the Master of the Rolls in Fairlie v. Hast- General principle.

(1) Daniell v. Pitt, 1 Campb. 366. Lloyd v. Willan, 1 Esp. N. P. C. 178.
(2) Gainsford v. Grammar, 2 Campb. 9.
(3) Daniell v. Pitt, 1 Campb. 366. 6 Esp. N. P. C. 74. S. C. Williams v. Innes, 1 Campb. 364. Brock v. Kent, ib. n. 366. Burt v. Palmer, 5 Esp. N. P. C. 145. Garnet v. Ball, 3 Stark. N. P. C. 160.
(4) 11 St. Tr. 171.

(*j*) See Note 181, p. 180.

Statement of Agent.

ings(1), "I do not see how they can be evidence against the principal:" and therefore in that case, (where the fact, sought to be established, was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of,) he refused to admit, as evidence of this fact, the declaration of the defendant's agent, who had been employed to keep the bond for the plaintiff's benefit, and who, on its being demanded by the plaintiff, informed him, that it had been delivered to the defendant. (2) "The admission of an agent, (continued the Master of the Rolls,) cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting any thing, that any person may have asserted, as to his conduct or agree ent, merely because that person has been an agent. If any fact, material to the interest of either party, rests in the knowledge of an agent, the general rule is, that it ought to be proved by his testimony, not by his mere assertion."(*k*)

Rule in criminal case.

On the impeachment of Lord Melville (3) the House of Lords decided, that a receipt given, in the regular and official form, by Mr. Douglas, (who, as it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of Treasurer of the navy, and to receive all necessary sums of money, and sign receipts for the same,) was admissible, as evidence, against Lord Melville, to establish this single fact, that a person, appointed by him, as his paymaster, did receive from the exchequer a certain sum of money, in the ordinary course of business. "The first step in the proof of the charge," said the Lord Chancellor, "must advance by evidence, applicable alike to civil and to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but is a totally different question, in the consideration of criminal justice, as distinguished from civil, how the noble person, now on trial, may be effected by the fact, when so established. The receipt by the paymaster

(1) 10 Ves. 128.
(2) Fairlie v. Hastings, 10 Ves. 128.
Young v. Wright, 1 Campb. 139.
Wilson v. Turner, 1 Taunt. 398.
(3) 29 Howell's State Trials, 746—763.

(*k*) See Note 182, p. 180.

would in itself involve him civilly, but could by no possibility convict him of a crime." Statement of agent.

In the course of the late proceedings in the House of Lords, on the bill of Pains and Penalties, a question was proposed to the judges as to the competency of proving, on the trial of a criminal prosecution, certain acts supposed to have been done by the agent of the prosecutor. On that occasion the judges determined, that a defendant's counsel would not be allowed to prove, in the defence, that A. B., who had been employed as agent to procure evidence in support of the indictment, but who had not been examined as a witness, offered a bribe to some third person (who likewise had not been examined,) to induce him to give evidence touching the subject matter of the prosecution; and, similar proof, as to the conduct of the defendant's agent, would be equally inadmissible, if offered on the part of the prosecutor. (1) Here, it is to be observed, the act of the agent, which it was proposed to prove, is supposed to have been addressed to a person not called as a witness for the prosecution, and to be of a nature entirely unconnected with any particular matter deposed to by other witnesses; so that those witnesses would not be in any manner affected by the proposed proof, excepting by way of inference and conclusion. These circumstances were particularly noticed by the Lord Chief Justice in delivering the opinion of the judges. The Lord Chief Justice, at the conclusion of his speech, after observing on the abstract nature of the question, added, "notwithstanding the opinion thus delivered, he was by no means prepared to say, that in no case, and under no circumstances appearing at a trial, it might not be fit and proper for a judge to allow proof of such a nature to be submitted to the consideration of a jury; and the inclination of every judge would be to admit, rather than to exclude, the offered proof." Acts by prosecutor's agent.

The fact of the agency must be first established, before the declarations of a supposed agent can be received. (*l*) For this Proof of agency.

(1) See printed evidence, p. 861. 865. 868., 2 Brod. & Bing. 302. There are some very sensible remarks on a subject nearly connected wtih this, in Burnett's Commentary on the Criminal Law of Scotland, p. 415—419.

(*l*) See Note 183, p. 188.

Statement of agent.

purpose, the admissions of the principal are evidence against himself; (*m*) or the fact may be proved directly by the agent. (*n*) In the case of Johnson v. Ward (1), an action on a policy of insurance, the affidavit of a person, stating that he subscribed the policy on behalf of the defendant, (which affidavit the defendant himself had previously used, on a motion to put off the trial,) was, under the particular circumstances, properly admitted as proof of the agency. The defendant, having used the affidavit for such a purpose, must be considered as having known and adopted its contents. But the single circumstance, that the affidavit purports to have been made by a person as agent, would not be sufficient proof of his being invested with that authority.

Proof of power.

If the action is brought upon a deed, or if a deed is given in evidence in support of the defendant's plea, and the deed has been executed under a power of attorney, the power must be proved; as, where the defendant, in an action of replevin, made cognizance under A. B. for rent in arrear, and a lease executed by the wife of A. B., as attorney to her husband, was given in evidence, Lord Kenyon held, that she could not, in the first instance, be examined as to the lease, without proof of the power of attorney. (2) (*o*) But there it might be shewn that the husband had admitted or recognized her authority, and the validity of the lease: and some such evidence appears to have been given in that case.

General authority.

Proof that a person has acted as agent in other instances, in which the principal has recognised his acts, will be sufficient evidence of a general authority; as, where one had subscribed several policies, besides the one in question, in the defendant's name, which had been afterwards recognised by him. (3) So, where the defendant's son had in three or four instances signed bills of exchange for his father, this was held to be sufficient *prima facie* evidence, in an action upon a guarantee purporting to be in the father's name, of an authority to the son to sign the guarantee. (4) In the two last cited cases, it must be presumed,

(1) 6 Esp. N. P. C. 48.
(2) Johnson v. Mason, 1 Esp N. P. C. 88.
(3) Neale v. Erving, 1 Esp. N. P. C. 61.
(4) Watkins v. Vince, 2 Starkie, N. P. C. 368.

(*m*) See Note 184, p. 188. (*n*) See Note 185, p. 189. (*o*) See Note 186. p. 189.

as a very sensible writer has observed, (1) that the acts of the agent in such other instances, as were given in evidence for the purpose of shewing a general authority, where proved to have been recognized by the principal. Such previous proof appears to be indispensably necessary; and, therefore, in the case of Courteen v. Touse, (2) where a witness proved that he had often seen the supposed agent sign policies for the defendant, but had never seen any general power of attorney for that purpose, and was not acquainted with any instance in which the defendant had paid a loss upon such a policy, Lord Ellenborough held, that this was not sufficient proof of agency. (*p*) Admission by attorney.

Proof by a witness, that he has acted for many years as the bailiff of A. B. for a certain manor, and during that time made returns to mandates directed to A. B. as lord of the manor, will be sufficient evidence of his being bailiff, though he may never have seen A. B.; and the fact of A. B. being lord of the manor will be proved by the sheriff's mandate to him as such, together with the bailiff's return. (3) Bailiff.

The attorney of one of the parties, who has made an admission with intent to obviate the necessity of proving the fact, must be supposed to have an authority for that purpose, and his client will be bound by the admission; as, where he has given a formal admissions of a the execution of deed, or of the dishonor of a bill; but whatever the attorney may happen to state in the course of conversation is not evidence in the cause. (4) An undertaking by the attorney to appear for the defendants, describing them as joint owners of a ship, is evidence of their joint ownership; (5) and a notice by the defendant's attorney, to produce papers relating to a bill of exchange, which describes the bill to have been accepted by the defendant, is evidence of his acceptance. (6) Propositions, made by an attorney on the part of his client, respecting a demand which Admission by attorney.

(1) Paley on Principal and Agent, 201.

(2) 1 Campb. 43, n. Whitehead v. Tucket, 15 East, 400.

(3) Tyler v. D. of Leeds, 2 Starkie, N. P. C. 218.

(4) Young v. Wright, 1 Campb. 141. Millward v. Temple, 1 Campb. 375. Goldie v. Shuttleworth, 1 id. 70. An admission, by the defendant's attorney, of the hand-writing of a person attesting a deed, is tantamount to an admission of the execution by the defendant. 1 Campb. 375.

(5) Marshall v. Cliff, 4 Campb. 133.

(6) Holt v. Squire, 1 Ry. & Moody, 282.

(*p*) See Note 187, p. 180.

Admission by under-sheriff.

another person had against him, whether made before or after the commencement of a suit, may be used as evidence against the client. (1) These propositions, though they cannot be proved by the attorney, from a regard to the privilege of the client, yet if proved by another witness, are received as the admission of an accredited agent. (2) And proof that the propositions or admissions were made by the attorney on the record, will be sufficient to establish his agency. (3)(*q*)

Proof.

Special case.

A special case signed by the counsel on both sides, for the opinion of the court above, and stating facts proved at the trial of the cause, has been admitted as evidence of those facts on a new trial. (4) Whether admissions, made by the defendant's counsel on a former trial, can be received as evidence against the client on a new trial, even supposing the client to have been present and within hearing, is a question of some difficulty. The late Lord Chief Baron rejected such evidence. (5)(*r*).

Statement of under-sheriff.

The declarations and statements of an under sheriff have been thought admissible in evidence against the sheriff, on the ground of his being the sheriff's general agent. (6) But a distinction is to be made between statements by an under sheriff, and statements by a bailiff or high sheriff's officer. The bailiff is not the sheriff's general deputy for all official purposes; when a warrant is granted, he becomes the special officer of the sheriff. (7) The statements of a bailiff, therefore, are admissible as evidence against a sheriff, only so far as they form a part of the transaction, in which he represents the sheriff, and for which the sheriff is responsible. (8) In no case is the statement of the sheriff's officer admissible, unless the relation between the officer and the sheriff, in the particular transaction, has been clearly proved by other independent evidence. (9)(*s*)

Of bailiff.

(1) Gainsford v. Grammar, 2 Campb. 9.
(2) S. C., 2 Campb. 9.
(3) Marshall v. Cliff, 4 Campb. 133.
(4) Van Wort v. Wolley, 1 Ry. & Mo. 4, by Abbott, C. J.
(5) Colledge v. Horn, 3 Bing. 119.
(6) Yabsley v. Doble, 1 Ld. Raym. 190. 7 Term Rep. 117.
(7) 7 T. R. 117.
(8) North v. Miles, 1 Campb. 389. Bowsher v. Cally, 1 Campb. 391. This subject is more fully treated of, in the 2d vol.
(9) On this subject, see 2d vol. & title *Sheriff* in the index.

(*q*) See Note 188, p. 190. (*r*) See Note 189, p. 191. (*s*) See Note 190, p. 191.

Admission, what.

An acknowledgment of a debt may be frequently implied from the conduct and demeanour of a person, no less than from an express admission; and the forbearance and non-interference of one party, with full knowledge of adverse acts done by another party, is a circumstance to shew his acquiescence. (1) An admission may sometimes be inferred from what has been said in the presence and hearing of a person without his opposing or contradicting. (*t*)

Effect.

The force and effect of an admission must of course depend upon the circumstances under which it has been made. In many cases it will be evidence of the strongest kind, if clearly proved: in some, it amounts to little. A full and free admission of a debt is, unless satisfactorily explained, conclusive against the party who makes it.

Proving under commission.

Proof, that a defendant, in his examination before commissioners of bankrupt, has proved his debt under the commission, is not evidence against him of such a petitioning creditor's debt, as will support the commission; much less is it evidence against a co-defendant, in an action by the assignees. (2) The creditors have not the means of knowing the evidence, on which the party was declared bankrupt; and it would not be reasonable, that by proving their debts they should be put to the dilemma of being barred by a certificate, or of being understood to have admitted, that every act necessary to support the commission really existed, when they had not the means of judging, whether such acts did or did not exist. (3) (*u*)

Admission of debt.

An admission by the defendant, that he owes a certain sum of money to the plaintiff, is strong evidence against him, in an action to recover the debt, but it will not be conclusive: (*v*) the defendant, if he can, may prove the fact of payment, or shew a receipt, or give other evidence to repel the presumption arising

(1) See the following examples: Jarrett v. Leonard, 2 Maule. & Selw. 265. Morris v. Burdett, 1 Campb. 218. Doe dem. Sheppart v. Allen, 3 Taunt. 78. Maltny v. Christie, 1 Esp. N. P. C. 341, cit. 16 East, 193. Doe dem. Winkley v. Pye, 1 Esp. N. P. C. 364.

(2) Rankin v. Horner and Lauday, 16 East, 191.

(3) Rankin v. Horner and Lauday, 16 East. 192.

(*t*) See Note 191, p. 191. (*u*) See Note 192, p. 199. (*v*) See Note 193, p. 218.

Effect of admission.

Receipt.

from his acknowledgment. A receipt for money is not conclusive against the person who has signed it; but he may shew, if he can, that the money has not been received, (1) or that he gave the receipt under a misrepresentation. An indorsement on a deed, (2) of a receipt of a sum of money, is not conclusive, the deed itself in its contents not stating such receipt: and it may be shewn that in fact the money was not paid; the indorsement, not being under seal, cannot amount to an estoppel, but can only be evidence for the jury, capable of being rebutted by other circumstances in the case. (3) (*w*) A bill delivered by an attorney to his client, for business done during a certain period, is strong presumptive evidence against any additional item within the same period; but the bill is not like a deed to operate as an estoppel, and the party will be at liberty to prove the fact of his having transacted other business for the defendant. (4) (*x*)

Attorney's bill

Notice to quit not objected to.

A notice to quit at a certain time is evidence, that the tenancy commenced at that period, if the notice was served personally on the tenant, and if he made no objection to the time of quitting mentioned in the notice. (5) The circumstance of his not making such an objection has been considered as *prima facie* evidence of an admission and acquiescence. If, on the other hand, it should be made to appear, that at the time of the service the tenant did not look at the notice so as to know its contents, or could not read, such evidence would completely repel the supposition of any acquiescence on the part of the tenant; for he cannot be supposed to admit a fact, of which he does not appear to have been informed. (6)

Offer by way of compromise.

An offer by a party, to pay money by way of compromise, and to get rid of an action, is not evidence of a debt, as an admission. (7) Where a party submits to make a sacrifice, with the view of buying peace, it would be unjust to construe such a con-

(1) Stratton v. Rastell, 2 T. R. 366.
(2) Skaife v. Jackson, 3 Barn. & Cress. 421.
(3) Lampon v. Corke, 5 Barn. & Ald. 606, 611.
(4) Loveridge v. Botham, 1 Bos. & Pull. 49.
(5) Doe dem. Clarges v. Foster, 13 East, 405. Doe dem. Leicester v. Biggs, 2 Taunt. 109, Doe dem. Baker v. Woombwell, 2 Campb. 559. Thomas dem. Jones v. Thomas, 2 Campb. 647.
(6) Thomas v. Thomas, 2 Campb. 647.
(7) Bull. N. P. [236.] Gregory v. Howard, 3 Esp. N. P. C. 113.

(*w*) See Note 194, p. 213. (*x*) See Note 195, p. 218.

cession into an unequivocal acknowledgment of the adverse party's right. "If A. sue B. for 100*l.*, and B. offer to pay him 20*l.*, it shall not be received in evidence; for this neither admits nor ascertains any debt, and is no more than saying, he would give 20*l.* to get rid of the action. But if an account consists of ten articles, and B. admits that a particular one is due, it is good evidence for so much." (1) (*y*)

Admissions before arbitrator.

Admissions of particular articles before an arbitrator are also evidence under the same limitation, that is, when they are made, not with a view to a compromise, but while the parties are contesting their rights; (2) (*z*) and these admissions may be proved by the arbitrator himself. (3)

Agreement.

The rule now under consideration, applies only to treaties for the amicable adjustment of disputes, which are not afterwards concluded. (4) It cannot be applied to a case, where a treaty has been reduced to a final agreement, signed by the parties, and executed: such an agreement, though purporting to be a compromise, will be admissible in evidence against the party who signs it. (4) (*a*)

Limitation of rule.

A distinction also is to be made, on this subject, between an admission of some fact connected with the merits of the cause, and an admission of an indifferent fact, as of the hand-writing of a party. Thus, on the trial of an action, which had been once withdrawn under a treaty between the parties, Lord Kenyon allowed proof of the defendant's having admitted of his acceptance on a bill of exchange, though the admission had been made during the treaty; (5) he held that any admission by the party, respecting the subject matter of the action, pending a treaty on the faith of which it was made, could not be received to his prejudice; but added, that such a fact as that of the party's hand-writing, not being connected with the merits of the cause, and capable of being easily proved, stood on different grounds, and that an admission of this fact might be received.

(1) Bull. N. P. [236.]
(2) Bull. N. P. ib. 1 P. Wms. 497, Slack v. Buchanan, Peake, N. P. C. 5.
(3) Gregory v. Howard, 3 Esp. N. P. C. 113.
(4) Froysell v. Dewelyn, 9 Price, 122, 128.
(5) Waldridge v. Kennison, 1 Esp. N. P. C. 143.

(*y*) See Note 196, p. 218. (*z*) See Note 197, p. 223. (*a*) See Note 198, p. 223.

Whole of admission together.

It is scarcely necessary to observe, that the whole of an admission must be taken together, in order to show distinctly the full meaning and sense of the party. * Thus, if a person, in making an admission against his own interest, refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shown, before the statement can be used as evidence against the party. (1) (*b*) Or, if a person says, "that he did owe a debt, but that he had paid it," such an admission would not be received as evidence to prove the debt, without being also evidence of the payment. (2) (*c*) What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however, it is reasonable, that if any part of his statement is admitted in evidence, the whole should be admitted. (*d*)

Sect. V.

Of the Admissibility of the Confession of a Prisoner against himself.

Voluntary confession.

Since an admission is evidence against a party in civil suits, with much stronger reason is the voluntary confession of a prisoner evidence against him on a criminal prosecution: for it is not to be conceived, that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. The general rule on this subject was very fully considered in a judgment delivered by Mr. Justice Grose, on a case reserved for the opinion of the twelve judges; and it seems to be now clearly established, that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced into writing or not, in short, that any voluntary confession, made by a prisoner to any person at any time or place, is strong evidence against him. (3) (*e*) Such

General rule.

(1) See Jacob v. Lindsay, 1 East, 462. Smith v. Young, 1 Campb. 439. Lord Barrymore v. Taylor, 1 Esp. N. P. C. 325. Collett v. Ld. Keith, 4 Esp. N. P. C. 212. Rondle v. Blackburn, 5 Taunt. 245. Boardman v. Jackson, 2 Ball and Beatty, 386.

(2) Anonym. case, cited 12 Vin. Abr. tit. Ev. A. b. 23. Green v. Dunn, 3 Campb. 215. Smith v. Young, 1 Campb. 439. Smith v. Blandy, 1 Ry. & Mo. 258.

(3) Lamb's case, 2 Leach, Cr. C. 625. Hawk. P. C. b. 2, c. 46, s. 81. Thomas's case, 2 Leach, 728. Hale's case, East. T. 1790, MS.

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* See Note 190, p. 223. (*b*) See Note 200, p. 228. (*c*) See Note 201, p. 224. (*d*) See Note 202, p. 230. (*e*) See Note 203, p. 232.

Confession alone.

confession is sufficient ground for a conviction, if it was made before a magistrate under a charge of the offence, although there is no other proof of his having committed the offence, or of the offence having been committed. (1) (*f*)

Voluntary.

The confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise: for however slight the promise or threat may have been, a confession, so obtained, cannot be received in evidence,(2)(*g*) on account of the uncertainty and doubt, whether the prisoner might not have been induced, from motives of fear or of interest, to make an untrue statement. (*h*) And if a confession has been obtained from the prisoner by undue means, any statement, afterwards made by him under the influence of that confession, cannot be admitted in evidence. (3)(*i*)

Stranger interposing.

It is not an objection to the admissibility of a confession, that it was made by the prisoner after an admonition from a stranger, that he ought to tell the truth, although the admonition was in the presence of a constable, to whom the confession was afterwards made. (4) In another case, where the counsel for the prisoner objected to the admissibility of a confession made before the committing magistrate, and offered to prove, that the wife of the constable had told the prisoner, some days before the commitment, that it would be better for him to confess, Mr. Baron Wood over-ruled the objection, and admitted the confession. (5)(*j*)

Under mistake.

It is not an objection, that the confession was made under a mistaken supposition, that some of the prisoner's accomplices were in custody; not even though some artifice has been used to draw him into that supposition. (6)(*k*) Nor is it any objection to a confession, made before a magistrate, that the prosecutor,

(1) Kelyng, 18. Wheeling's case, 1 Leach, Cr. C. 349, n. (*a*) Eldridge's case, Russ. & Ry. Cr. C. 440. Falkner's case, ib. 348. White's case, ib. 508. Tipett's case, ib. 509.

(2) Thompson's case, 1 Leach, Cr. C. 327. Cass's case, n. (*a*), ib. 328. Warwickshall's case, 1 Leach, Cr. C. 299. 2 Leach, 636., note in Lambe's case, 2 East, P. C. 568. Jone's case, Russ. &. Ry. Cr. C. 152. See Thornton's case, 1 Ry. & Mo. Cr. C. 27.

(3) R. v. White, Mitch. T. 1800, MS.

(4) R. v. Row, East. T. 1809, MS. Russ. & Ry. Cr. C. 153.

(5) R. v. Hardwick, Nottingham Lent Ass. 1811.

(6) R. v. Burley, East T. 1818, MS.

(*f*) See Note 204, p. 234. (*g*) See Note 205, p. 235. (*h*) See Note 206, p. 235. (*i*) See Note 207, p. 240. (*j*) See Note 208, p. 241. (*k*) See Note 209, p. 241.

Caution by magistrate.

who was present, first desired the prisoner to speak the truth, and suggested that he had better speak out; on which, the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but say what he thought proper. (1)(*l*)

Promises antecedent to confession before a magistrate.

Voluntary confessions before magistrates have been in some cases objected to, on account of some promise of favor having been made to the prisoner before he was taken into the presence of the magistrate. In a case of this kind, mentioned by Mr. East, (2) where hopes of favour had been given, and the prisoner refused before the magistrate to confess except upon conditions, Mr. Justice Buller observed, that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favor on that account, and it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession could be given in evidence. In another case, tried before Mr. Justice Baily, (3) where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but that on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances before the magistrate was held to be clearly admissible.

In a still later case, it appeared that a constable told the prisoner he might do himself some good by confessing; the prisoner afterwards asked the magistrate, if it would be any benefit to him to confess; on which the magistrate said, he could not say it would, and the prisoner then declined confessing; but afterwards, in his way to prison, he made a confession to another constable, and he confessed again in prison to another magistrate; the judges were unanimous in holding, that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. (4)(*m*)

(1) R. v. Edwards, East. T. 1502. MS.
(2) 2 East, P. C. 658.
(3) R. v. Lingate, Derby Lent Ass. 1815.
(4) R. v. Rosier, East. T. 1821 MS.

(*l*) See Note 210, p. 241. (*m*) See Note 211, p. 242.

The effect of an antecedent promise of favour, in rendering a confession before a magistrate inadmissible, must depend upon the nature of the promise, the time and circumstances in which it was made, and on the situation of the person from whom the promise came. A promise held out by the prosecutor, recently before the examination, or by the constable who had the prisoner in custody, may be supposed to have great influence. On the other hand, a promise made some time before, by some indifferent person, who interfered officiously without any kind of authority, and promised without the means of performance, can scarcely be deemed sufficient to produce any effect, even on the weakest mind, as an inducement to confess. (*n*)

Parol evidence of the prisoner's statement before a magistrate ought not to be received, until it is clearly shown, that the statement has not been reduced into writing; (1) (*o*) for the statute, after directing the magistrate to take the examination of the prisoner, expressly enjoins him to put it in writing. (2) (*p*) The propriety of committing the examination to writing, instead of leaving it to the uncertain memory of surrounding witnesses, cannot be too strongly impressed on all who are entrusted with such judicial powers. It is also of the utmost importance, that the confession should be committed to writing with the most scrupulous attention, and, as nearly as can be done, in the very words of the prisoner. (*q*)

Parol evidence.

Mode of taking examination.

The informations against the prisoner before a magistrate are to be taken on oath; the account given by the prisoner ought to be taken without oath. (3) (*r*) If the prisoner has been sworn, his statement cannot be received; and if the written deposition of a prisoner purports to have been taken on oath, evidence is not

Not on oath.

(1) Jacob's case, 1 Leach, Cr. C. 348. Fearshire's case, ib. 240.

(2) St. 7 G. 4. c. 64. s. 2. This statute repeals 1 & 2 P. & M. c. 13. and 2 & 3 P. & M. c. 10. In which there was a similar regulation.

(3) Bull. N. P. 242. Hawk. P. C. b. 2. c. 46 s. 27. Kelyng, 2. 7 G. 4. c 64. s. 2.

(*n*) See Note 212, p. 242. (*o*) See Note 213, p. 243. (*p*) See Note 214, p. 244. (*q*) See Note 215 p. 244. (*r*) See Note 216, p. 244.

admissible for the purpose of showing, that in point of fact he was not sworn. (1)

Examination by justice.

The justice before he commits to prison any person arrested for felony, or on suspicion of felony, (*s*) is directed to take *the examination of such person*, and the information upon oath of those who shall know the facts and circumstances of the case, and to put the same, or as much thereof as is material, into writing. He is further directed to subscribe all such examinations and informations. (2) (*t*) The words in the act, respecting the taking of *the examination*, imply an authority given to examine the prisoner, and, therefore, to put questions (for without questions no examination can be carried on) as to the facts proved against him. And now, the better opinion appears to be, that an examination, so taken, is not to be rejected on the ground that the prisoner had been previously questioned by the justice. (3) (*u*) But though this is the rule of law according to the strict letter of the statute, yet the most humane, the safest, and best course to be generally adopted by justices, is, not to press the accused with questions, but to leave him at liberty to speak or not in his defence, as he may think fit.*

Signing.

The examination of the prisoner, when reduced into writing, ought to be read over to him, and tendered to him for his sig-

(1) R. v. Smith and Hornage, 1 Starkie, N. P. C. 242., by Le Blanc J. In the case of R. v. Merceron, 2 Starkie, N. P. C. 366., a statement by the defendant before a committee of the House of Commons was offered in evidence; an objection was made, that the statement had been made under a compulsory process, and under the pain of incurring punishment as for a contempt, and could not therefore be considered voluntary; but the objection was overruled, and the evidence received.

(2) 7 G. 4. c. 64. s. 2.

(3) Ellis' case A. D. 1826, before Littledale J. 1 Ry. Mo. 425., and a case there cited, before Holroyd J. R. v. Wilson, before Richards C. B. contra, Holt, N. P. C. 597.

* The st. 2 & 3 P. & M. c. 10, also under which justices used to act till the late stat. of 7 G. 4. c. 64. passed, required justices to *take the examinations* of prisoners. Lambard, a writer in the reign of Elizabeth, in noticing the statute of P. & M. writes thus: "There also you may see, if I am not deceived, the time when the examination of the felon himself was first warranted by our law, *For at the common law, his fault was not to be wrung out of himself*, but rather to be proved by others." Eirenarcha, cap. 21. p. 208. See also Dalton Just. chap. 164 p. 544., and Crimp. 193. The passage, above cited from Lambard, shows how the law was then understood, though it also proves that the power, given by the statute, was exercised with great harshness.

(*s*) See Note 217, p. 245. (*t*) See Note 218, p. 245. (*u*) See Note 219, p 246.

nature; it ought to be subscribed also by the magistrate. (1) (*v*) The signature, however, of the prisoner is not essentially necessary; but only for precaution, and for the facility of future proof. In Lambe's case (2), before mentioned, the question for the opinion of the judges was, whether a written examination, taken by a committing magistrate, and containing a confession, which the prisoner, on hearing it read over to him, admitted to be true, but refused to sign, ought to have been received in evidence, as it was not signed by the magistrate (3) or by the prisoner; and a majority of the judges held, that such a confession would have been evidence at common law, and that it is not rendered inadmissible by any provision in the statutes of Philip and Mary respecting examinations and informations before justices of the peace. In this case the examination was rendered admissible by the prisoner's acknowledging the truth of its contents: if he had not made such an admission, but had only refused to sign it, after it had been read over to him, it could not have been received in evidence. (4) (*w*)

Unsigned memorandum.

Minutes of the prisoner's examination, which have not been signed by him, nor read over to him after they were taken in writing, though they cannot be admitted in evidence as a judicial examination, may yet be used by a witness, who was present when the minutes were made, as a memorandum to refresh his memory. (5) (*x*)

Evidence only against the prisoner.

The confession is evidence only against the person confessing, not against others, although they are proved to be his accomplices. It was resolved by all the judges in the case of Tong and others (6), on an indictment for high treason, that a confession by one of the prisoners was evidence only against the

(1) 7 G. 4. c. 64., s. 2. This stat. requires the committing justices to subscribe the examinations and informations: which was not required by the st. of P. & M.

(2) 2 Leach. Cr. C. 625. Thomas's case, ib. 727. S. P.

(3) See Note (1).

(4) R. v. Telicote, 3 Starkie, N. P. C. 483.

(5) Layer's case, 16 Howell, St. Tr. 214.

(6) Kelyng, 18., res. 5. Gilb. Ev. 124. Many instances are to be found among the earlier state trials, of confessions, even of convicts, being used as evidence against prisoners charged with the same offence. This was done in Sir Nicholas Throckmorton's case, and in the trials for the murder of Sir Thomas Overbury. It appears to have been the general practice, in those times, to receive confessions as proof against third persons.

(*v*) See Note 220, p. 246. (*w*) See Note 221, p. 246. (*x*) See Note 222, p. 246.

party himself who made the confession, and could not be made use of as evidence against any others, whom on his examination he confessed to be in the treason. And if one in his examination before the justice, implicate another who is present, and, though charged with the offence, does not deny it, yet this is not to be used against him as an admission or confession. (1) (*y*)

If the confession is not in writing, the whole of what the prisoner said must be fully stated, although it may happen that some part of it concerns other prisoners who are tried on the same indictment. In such a case it is not possible to make any selection; for until the evidence has been heard, it cannot be known what it is, or to whom it relates; and all that can be done is to direct the jury not to take into their consideration such parts as affect the other prisoners. But, in the case of a written confession, a distinction is commonly made in this respect, when that part relating to the other prisoners is capable of being separated and detached from the rest, or can be so read as not to affect in any degree the prisoner's narrative against himself. (*z*)

Discoveries in consequence of confessions.

It has been determined by the opinion of all the judges, that although confessions, improperly obtained, are not admissible, yet that any facts, which have been brought to light in consequence of such confessions, may be properly received in evidence. Thus where a prisoner was charged, as accessary after the fact, with having received property knowing it to be stolen, proof was admitted of the property being found concealed in the prisoner's lodgings, although the knowledge of that fact had been gained from an inadmissible confession. (2) (*a*) And on a prosecution for receiving stolen goods, evidence has been admitted, that the prisoner described the place where the goods were concealed, and that afterwards they had been found there; (*b*) but that part of the confession, in which he acknowledged that he himself had concealed them, was rejected, as it was improperly drawn from him. (3) (*c*) And that part also of his con-

(1) R. v. Appleby, 3 Starkie, N. P. C. 33. by Holroyd J. & S. P. said by him to have been so ruled by several judges in an earlier case.

(2) Warwickhall's case, 1 Leach, Cr. C. 300. Mosey's case, ib. n. (*a*) 301. Lockhart's case, ib. 430, 2 East, P. C. 658, S. C.

(3) Grant's case, and Hodge's case, 2 East, P. C. 658. 1 Leach, Cr. C. 301, n. (*a*), S. C. Griffin's case, Russ. Ry. Ca. C. 151.

(*y*) See Note 223, p. 246. (*z*) See Note 224, p. 247. (*a*) See Note 225, p. 249. (*b*) See Note 226, p. 249. (*c*) See Note 227, p. 250.

fessions in which he has described a particular spot as the place where the goods were concealed or deposited, would be inadmissible, unless confirmed afterwards by the proof of finding them there. (1) (*d*) There is good reason for this distinction; for, what the prisoner has said respecting the concealment of the property, is ascertained to be true by the fact of the subsequent discovery, but the other part of the confession, in which he charges himself with having concealed it, may have been made untruly and under the influence of the threat or promise.

Confession in case of treason.

The stat. of the 7th W. 3. c. 3. s. 2. enacts, "that no person shall be indicted, tried, or attainted, for high treason, or misprision of high treason, but upon the oaths and testimony of two witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason, unless the party indicted and arraigned shall willingly without violence in open court confess the same." Mr. Justice Foster seems to have been of opinion (2), that the legislature intended by this section to require two witnesses to the overt acts in all cases, except where the prisoner confessed the treason upon his arraignment in open court, and that to warrant a conviction there must be proof of the overt acts upon oath, not merely proof of the confession of the overt acts. "But," he adds (3), "perhaps it may now be too late to controvert the authority of the opinion in 1716, in Francia's case, warranted as it hath been by later precedents." (4) The rule is now clearly settled. All the judges, on a conference preparatory to the trial of Francia (5), held that a confession of the overt acts, if proved by two witnesses, is proper evidence to be left to a jury. The same construction of the statute was adopted in Greg's case (6), by six judges against two: in Berwick's case (7), by Ld. C. J. Willes and Sir Thomas Abney against the opinion of Mr. Justice

(1) Jenkins' case, Russ. Ry. Cr. C. 492.
(2) See Fost. Disc. 232. 240. 243 Willis's case, ib. 242. S. C. 8 St. Tr. 254, 255. fol. ed. S. C. 15 Howell's St. Tr. 622. Smith's case, Fost. 240. 243.
(3) Fost. Disc. 243.
(4) See Fost. Disc. 11. n.
(5) Francia's case, 1716. Mr. J. Burnett's MS. 1 East, P. C. 133. Kelyng, 18.
(6) Greg's case, 1 East, P. C. 134.
(7) Fost. Disc. 10.

(*d*) See Note 228, p. 250.

Foster; and by the judges in the commission, on the trial of the rebels in 1746. (1)

39 & 40 G. 3. c. 93.

If the overt act of high treason, alleged in the indictment, is the assassination of the king, or any direct attempt against his life or his person, it is plain from the provision of the stat. 39 & 40 G. J. c. 33. (which enacts, that in such cases the prisoner shall be tried according to the same order of trial and upon the like evidence as if he stood charged with murder,) that a confession, proved by a single witness, will be sufficient to convict the prisoner. (*e*) And the overt acts themselves may be proved by a single witness. (2) In these cases, the rule of the common law is restored.

Proof of collateral facts.

In all cases of high treason, when the prisoners' confession is offerred in evidence as confirmatory of the testimony of the witnesses, it is clearly admissible, though proved by a single witness. (3) (*f*) And with regard to all facts merely collateral, which no not conduce to the proof of the overt acts, it may be laid down as a general rule, that whatever was ev dence of them at common law, is still good evidence under the statute of William. (4) A confession therefore, of such collateral facts is still admissible in evidence though proved by a single witness.

Principle of the rule.

From the above-cited cases, it appears now to be an established rule, that a full and voluntary confession by the prisoner, of the overt acts charged against him, if proved by two witnesses, isof itself sufficient evidence to warrant a conviction. (*g*) And, although M. Justice Foster suggests, (5) that "the rule, for admitting a confession against the prisoner, ought not to extend further than to a confession made during the solemnity of an examination before a magistrate, or before some person having authority to take it, when the party may be presumed to be properly upon his guard and apprised of its danger," no distinction of this kind is to be found in the authorities before mentioned. On the contrary, in Francia's case the judges resolved, that the confession

(1) Fost. Disc. 11. n. (†). 1 East, P. C. 134.
(2) See infra, chap. 7. sec. 1.
(3) Willis's case, 8 St. Tr. 254, fol. ed. S. C. 15 Howell's St. Tr. 622.— And see Crossfield's case, 26 Howell's St. Tr. 56, 57.
(4) Fost. Disc. 242.
(5) Fost. Disc. 243. 4 Black. Com. 356.

(*e*) See Note 229, p. 250. (*f*) See Note 230, p 251. (*g*) See Note 231, p. 251.

would be evidence, whether made before a magistrate, or in the course of conversation.(1) And there appears to be no solid ground for such a distinction; as confessions are admissible in trials for high treason, precisely on the same principle which made them evidence at common law.

The observations of Mr. Justice Foster, on the subject of confessions in cases of high treason, relate to the effect of this sort of evidence, rather than to its admissibility. "Hasty confessions," he says,(2)" made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured: words are often mis-reported whether through ignorance, inattention, or malice—it mattereth not to the defendant—he is equally affected in either case: they are extremely liable to misconstruction; and withal, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted."

Proof of confession.

The proof of a confession will depend upon the manner or form in which the confession was made. A verbal confession, which has not been taken down in writing judicially, will be proved by some person, who heard the prisoner confess. A confession, taken in writing on an examination before a magistrate, is to be proved by the magistrate or his clerk, testifying, that the examination was truly taken, and contains the true substance of what the prisoner said upon his examination. (3) (*h*)

Sect. VI.

Of the Competency of the Party injured, as Witness in Criminal Prosecutions.

It is a general rule, that in criminal prosecutions the injured party may be a witness: although on the conviction of the prisoner he will in many cases be entitled to a reward.* (*i*)

(1) See Burnet J. MS. cited 1 East, P. C. 113, and Kelyng, 19.

(2) Fost. Disc. 243.

(3) 2 Hale, P. C. 51, 284, 285.

* A note was inserted in a former edition of this work, mentioning the several acts of parliament, which contain provisions respecting the granting of certificates

(*h*) See Note 232, p. 251. (*i*) See Note 233, p. 251.

Robbery.

It is the constant practice, on an indictment for robbery, to admit the evidence of a person who has been robbed; and it is not a sufficient objection, that he will be entitled to the restitution of his property, on the conviction of the offender. (*j*)

Perjury.

The same evidence is admitted in prosecutions for a cheat (1) or for perjury;(2) and in the case of perjury, it is not material, whether the party has or has not satisfied the judgment in the suit, in which the perjury was committed. It was, indeed, at one time thought an indispensable requisite to show the judgment satisfied; (3) on the supposition, that the party, in case of his procuring a conviction, might use it for the purpose of obtaining relief in equity against the judgment. But as it is now an established rule, that a court of equity will not grant relief on a conviction, which proceeds on the evidence of the prosecutor,(4) there can be no objection to his being admitted a witness.

In other cases also the party aggrieved will be allowed to give evidence on a criminal prosecution, (*k*) as he cannot afterwards avail himself of the record of conviction in any future suit, in

(1) Paris's case, 1 Vent. 42. 2 Sid. 431, S. C. R. v. Macartney, 1 Salk. 286.

(2) R. v. Broughton, 2 Stra. 1230. R. v. Boston, 4 East, 581. R. v. Ellis, 2 Stra. 1104. R. v. Nunez, 2 Str. 1042. R. v. Whiting, 1 Salk. 283, contra. But Lord Mansfield, in Abraham q. t. v. Bunn, 4 Burr. 2255, cites the case of R. v. Broughton as over-ruling the three last-mentioned cases.

(3) R. v. Eden, 1 Esp. N. P. C. 97. R. v. Daldy, Peake, N. P. C 12.

(4) Bartlet v. Pickersgill, cited in Abraham v. Bunn, 4 Burr. 2255, by Lord Mansfield C. J. and in R. v. Boston, 4 East, 577, by Lord Ellenborough,

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or pecuniary rewards on the conviction of offenders. Many of these provisions have been repealed by the statute 58 G. 3, c. 70. This statute recites, as a fact found by experience, that the rewards which have been given, have not produced the effect intended in checking crimes, and that the hope or expectation of obtaining such rewards has instigated evil-disposed persons to conspire to entrap the unwary and ignorant into the commission of offences, for which they have afterwards been apprehended and prosecuted to conviction by such conspirators. The statute, therefore, repeals all provisions of this kind in the following acts of parliament: st. 4 W. & M. c. 8, s. 2; st. 6, 7 W. 3, c. 17, s. 9; st 5 Ann, c. 31, s. 1; st. 14 G. 2, c. 6, s 2; st. 15 G. 2, c 28, s. 7. The power of granting rewards by st. 6 G. 1, for apprehending and prosecuting to conviction prisoners charged with taking rewards for helping to stolen goods without prosecuting the felon, and by st. 9 G. 2, c. 35, s. 11, for apprehending and convicting smugglers who oppose custom-house and excise officers by force of arms, and by st. 9 G. 1, c. 22, s. 12, for apprehending and convicting for the offences there mentioned, is still unrepealed.

(*j*) See Note 234, p. 252. (*k*) See Note 235, p. 252.

order to prove the criminal act. (1) For this reason, it is conceived, on an indictment for perjury, the party injured may be a witness, whether the prosecution is by the common law, or founded on the stat. 5 Eliz. c. 9, which gives him half the forfeiture incurred; for if, in an action to recover his moiety, he would be precluded from giving the conviction in evidence, the objection against his competency seems to be removed.* Perjury.

An exception to this general rule has been made in prosecutions for forgery; in which case, the person, whose name is forged, or upon whose genuine name a forgery is committed, is not admitted to prove it forged, if he would either be liable to be sued upon the instrument (supposing it genuine,) or be thereby deprived of a legal claim against another; in other words, if he has an interest in the destruction of what is supposed to be forged. (2) † It seems to be the prevailing opinion, that his incompetency is not confined to the single point of falsifying the hand-writing, but that he is equally incompetent to prove any other fact, which contributes to the proof of the forgery, or any fact conducive to the general conclusion. This subject was much discussed in a late case, (3) where on a prosecution for forging a promissory note, (on which there was an indorsement in the prisoner's hand-writing, that a year's interest had been paid,) one of the points reserved was, whether the person, by whom the note purported to be made, ought to have been permitted to prove, that he had never paid any interest on the note, as was pretended by the indorsement. This evidence was received on the trial, the fact of the forgery having been first proved; but, according to the report, it seems to have been Rule in forgery. Material facts.

(1) Bartlet v. Pickersgill, 4 East, 577, n. (*b*) S. C. 1 Eden, 515. S. C. 1 Cox. Cas. 15. R. v. Boston, 4 East, 581, Smith v. Rummens, 1 Campb. 9. Hathaway v. Barrow, 1 Campb. 151. Burdon v. Browning, Taunt. 520.

(2) Bayley on Bills, 4th ed. 450. The cases on this subject are the following: Watt's case, Hard. 331. 3 Salk. 172, S. C. Rhode's case, 2 Str. 721. 1 Leach, Cr. C. 29, S. C. Russell's case, 1 Leach, 10. Caffy's case, 2 East, P. C. 995. Taylor's case, 1 Leach, 255. Crocker's case, 2 New. Rep. 87.

(3) Crocker's case, Salib. Ass. 1805, before Le Blanc J. 2 New. Rep 87, 90. Russ. Ry. Cr. C. 97, S. C. R. v. Bunting, 2 East, P. C. 996.

* Ruled contra in an old case; Bacon's case, 2 Roll. Abr. 687; Bull. N. P. 289. S. C. Gilb Ev. 111, S. C.

† Respecting the modo of restoring the competency of the witness in such case, see post, Sect. 8.

Collateral facts.

generally understood, that the majority of the judges considered the evidence inadmissible.* When, however, the fact is merely collateral, and does not in any way contribute to the proof of the forgery, as, where a witness is called to prove himself the person, whom the prisoner intended to personate or describe, in such a case his testimony has been admitted. (1)

Prosecutor when competent in case of forgery.

If the witness would not incur any loss, nor be liable to a suit, whatever may be the result of the prosecution; in other words, if he has no interest in the instrument supposed to be forged, his evidence ought to be received. Thus, on an indictment for forging a bank-note, in the name of a cashier of the Bank of England "for the governor and company," the cashier, not being chargeable, may be a witness. (2) And on a prosecution for forging an acceptance to a bill of exchange, where the banker had paid the bill, but, suspecting a forgery, had not debited the person whose name was forged, this person was admitted to give evidence. (3) So, in Wells's case, (4) where the prisoner was tried for forging a receipt, the person, whose name the receipt purported to bear, having before recovered the money from the prisoner, was admitted to prove the forgery. The payee of a bill of exchange, who was employed to pay the produce in discharge of a debt owing from the drawer, but had not received the bill, is competent to prove the forgery of his name. (5) And the maker of a note, which purports to be payable on demand at his own place of residence or at a banker's, but has not been paid at either place, is competent to prove that he did not make it payable at the banker's. (6) A person, whose name has been forged to a power of attorney for selling stock, is competent,

(1) Parr's case, 2 Leach, Cr. C. 487, 491. 2 East, P. C. 997, S. C. But it seems not quite settled, that he is competent, even on such points. See Bayley on Bills, 4th ed. 450.

(2) Newland's case, 1 Leach, Cr. C. 350.

(3) Usher's case, Leach, Cr. C. 57.

(4) Bull. N. P. 289. 2 East, P. C. 1000, S. C.

(5) Sponsonby's case, 1 Leach, Cr. C. 374.

(6) Treble's case, 2 Taunt. 328.

* Lord Ellenborough C. J., Mr. Justice Lawrence, and Mr. Justice Le Blanc, thought the witness admissible, because it had been sufficiently proved before, that the note was not signed by him; and they thought him admissible to all points except that of the forgery. Some of the other judges seemed to think, that to points perfectly collateral he would have been admissible, but they considered the point to which he was called, as contributing to prove the forgery. Bayley on Bills, 4th ed. 450, Note.

if the stock has not been sold. (1) Where the forgery consists in altering a genuine instrument, thereby giving the bill or note a better credit, but not varying the responsibility of the drawer or maker, the drawer or maker is a competent witness to prove the forgery. (2)

Upon what principle, it may be asked, is a party, by whom an instrument purports to be made, incompetent to prove it forged? In Watt's case, (3) on an information for the forgery of a deed purporting to be the revocation of a will, it was adjudged by the barons of the exchequer, after a conference with the judges of the King's Bench, that no legatee named in the will, nor any other person who is a loser by the deed, or who may receive any advantage from the verdict, can be a witness for the prosecution: and a distinction was made between the case of an indictment for a battery, (where, it was admitted, the person beaten may be a witness, because he can reap no benefit by the verdict in another suit,) and the cases of forgery, perjury, or usury, in which, it was said, the party aggrieved may have an advantage by the verdict, and therefore shall not be received as a witness. It is, however, now an established rule, that on a prosecution for perjury, (4) the party aggrieved is competent: and, that a person who has borrowed money on an usurious transaction, is also a competent witness for the plaintiff in an action for penalties against the lender; (5) for he gains nothing by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. The case of forgery, therefore, is considered an anomaly in the law of evidence; (6) and though such an objection has been allowed in criminal prosecutions for forgery, yet, in a civil suit, if a question arise collaterally and incidentally, as to the genuineness of a written instrument, the person whose name it purports to bear, is competent to prove the forgery. (7)

Reason of this exception.

Civil suit.

(1) R. v. Wait, 1 Bing. 121.
(2) Bayley on Bills, 4th ed. 452.
(3) Watt's case, 3 Salk. 172, more fully reported in Hardr. 331. See 4 Burr. 2254, where Lord Mansfield says, that this and other cases of the same kind "were not considered or looked into."
(4) See ante, p. 112.
(5) Abraham q. t. v. Bunn, 4 Burr. 2251. Smith v. Prager, 7 T. R. 60.
(6) 4 East, 582. 4 Barn. & Ald. 210.
(7) Hunter v. King, 4 Barn. & Ald. 209.

The reason, assigned in Watt's case, is, that the witness would receive a benefit from the verdict; and it has been suggested, (1) that he is interested to procure a conviction, on the ground that a conviction would have the effect of inducing a forfeiture, and thus defeat every legal claim or security, which the prisoner might have upon the instrument. On the other hand, it may be said, if the party, by whom the instrument purports to be made, were admitted a witness, he would not be allowed afterwards to produce the record of conviction in a civil suit for the purpose of proving the supposed forfeiture, because the conviction must have proceeded partly upon his own testimony. (2) And if he would be precluded from using the record of conviction against the prisoner, and might therefore be admitted to give evidence on the trial consistently with the general rule; still less reason is there for excluding him in those cases, where the instrument purports to be made for the benefit of a third person, or where it has since become a third person's property, in either of which cases it would not be liable to forfeiture.

With regard to any probable advantage, which the witness may be supposed to receive from a conviction, by the prisoner's being disabled from giving evidence in any future suit, or from the great probability of his failing in an action in consequence of the discredit which a conviction must throw upon the instrument, (3) these are circumstances, which a jury would be directed to consider as forming a strong bias on the witness's mind, but which cannot render him incompetent. Upon the whole, the most intelligible reason, which has been assigned for the prevailing rule, is, because the indictment, in a prosecution for forgery, may be considered in some degree as a proceeding *in rem*, and a conviction would warrant a judicial cancellation of the forged writing. (4)* But the exception is manifestly anomalous and inconvenient; and requires the interference of the legislature. (*l*)

(1) 2 East, P. C. 994.
(2) Vid. infra, part 2. ch. 2, sect. 3.
(3) See 2 East, P. C. 994.
(4) Bayley on Bills, 4th ed. 450.

* By the law of Scotland, such an objection to a witness, in a prosecution for forgery, is never allowed. See Burnett's Criminal Law of Scotland, p. 444.

(*l*) See Note 236, p. 253.

Sect. VII.

Of certain Exceptions to the general Rule on the Subject of Interest.

It has been before stated as a general rule, that all persons, who gain or lose directly by the event of a cause, are incompetent to give evidence. There are, however, several exceptions to this general rule: some by act of parliament, as, where informers and the inhabitants of parishes or other districts are admitted; others from necessity (*m*) or a principle of public policy, (*n*) as, where evidence is received from persons who are entitled to rewards on convictions, or from agents, factors, or servants. Objections on the ground of interest proceed upon the supposition of too great a bias in the mind of the witness, and on the public utility of rejecting partial testimony. The presumption of bias may be taken off, by showing that the witness has as great or greater interest the other way, or that he has given up what interest he has: and the presumption of public utility may be answered, by showing that it would be very inconvenient, under the particular circumstances, not to receive such testimony. (1)

First, as to the evidence of informers:

Informers.

By the common law, informers, who are entitled under penal statutes to part of a penalty, are not competent witnesses. (2) (*o*) But, by the particular provisions or policy of several acts of parliament, they may be admitted. Where a statute can receive no execution, unless a party interested be a witness, there he must be allowed, says Ch. B. Gilbert; for the statute must not be rendered ineffectual by the impossibility of proof. (3) Thus, by stat. 2 G. 2, c. 24, s. 8, against bribery at elections, the legislature, in giving an indemnity and discharge to any person offending against the act, who shall discover any other offender so that he may be committed, must also have intended, that he

(1) By Lord Mansfield, 1 Burr. 422. Piercy, Andr. 18. R. v. Blaney, Andr. Stone, 2 Ld. Raym. 1545.
(2) R. v. Tilly, 1 Stra. 315. R. v. 240. 3 Burr. 1473. 4 East, 181. R. v.
(3) Gilb. Ev. 114.

(*m*) See Note 237, p. 253. (*n*) See Note 238, p. 253. (*o*) See Note 239, p. 254.

should be competent to give evidence at the trial; and, therefore, in an action for penalties he has been admitted. (1)

In a prosecution on stat. 21 G. 3, c. 37, against exporting machinery, the informer is competent. (2) So, on a prosecution for penalties under stat. 9 Ann, c. 14, s. 5, the loser of money at cards may prove his loss. (3) And, on a prosecution under stat. 23 G. 2, c. 13, s. 1, for seducing artifices to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty. (4) There is no express provision in either of the three acts of parliament last mentioned, for admitting the evidence of the party interested.

In the act of the 32 G. 3, c. 56, for preventing counterfeited certificates of servants' characters, there is a clause by which the evidence of the party aggrieved is rendered admissible; (5) and a similar provision is made by the act, (st. 33 G. 3, c. 75, s. 17,) which regulates hackney coaches. In prosecutions for all offences punishable on summary conviction under stat. 7 & 8 G. 4, c. 29. s. 64, the evidence of the party aggrieved is admissible.

Inhabitants.

Secondly, as to the evidence of the inhabitants of a parish or other district.

County bridge.

On an indictment against private persons or corporate bodies for not repairing a public bridge or the highway adjoining, the inhabitants of the county, town, riding, &c. in which the bridge is situated, are competent witnesses on the trial of such a prosecution, by the 1st Ann, stat. 1, c. 18, s. 13. Even before this statute, such evidence had been thought admissible from necessity. (6)

1 Ann. st. 1, c. 18.

Action against overseer.

In actions against churchwardens or overseers of a parish, for the recovery of money mis-spent by them, inhabitants of the parish

(1) Bush v. Railling, Say, 289. Mead v. Robinson. Willes, 425. Heward v. Shipley, 4 East, 182.

(2) R. v. Teasdale, 3 Esp. N. P. C. 68.

(3) R. v. Luckup, Willes, 425. (*c*)

(4) R. v. Johnson, Willes, 425. n. (*c*).

(5) Sect. 7

(6) R. v. Carpenter, 2 Show 47; and see 1 Ventr. 351. Gilb. Ev. 113. The section of the act above referred to, recites, that such inhabitants had not been allowed by judges to be legal witnesses.

who do not receive alms or any gift out of the parochial collection, are made competent witnesses by stat. 3 W. 3, c. 11, s. 12. 3 W. 3, c. 11.

In an action against a hundred by a party who has been robbed, the inhabitants of the hundred may be witnesses for the defendants, by stat. 8 G. 2, c. 16, s. 15. Before this act passed, they were not competent, because any one of them would have been liable to pay the debt, in case of judgment against the hundred. (1) The party robbed, though clearly interested, is yet competent to prove the robbery and the extent of his loss. (2) Against hundred. 8 G. 2, c. 16.

By the general rule of law, the inhabitants of a parish indicted for not repairing a highway, are not competent to give evidence for the parish. (3) But on trial of offences committed contrary to the highway act, it is provided, that any inhabitants of any parish, township, or place in which such offence shall be committed, shall not be deemed on that account an incompetent witness. (4) Highways.

And by 4 G. 4, c. 95, s. 84, it is enacted, that no person shall be deemed incompetent to give evidence in any action, suit, prosecution, or other legal proceedings to be brought or had in any court of law or equity, or before any justice or justices of the peace, under any act for making or maintaining any turnpike road, or under the act of 3 G. 4, by reason of being a trustee or commissioner of such road, or a mortgagee or creditor, of the tolls thereof, or a farmer, lessee, or collector of such tolls, or a treasurer, or clerk, or surveyor, or other officer under such act. Trustee of road.

Where pecuniary penalties are directed to be applied to the use of the poor, or for the benefit and exoneration of the parish or other place, the inhabitants are rendered competent witnesses on the trial of the offender, by stat. 27 G. 3, c. 29, provided the penalty, imposed by the act of parliament, does not exceed twenty Pecuniary penalty. 27 G. 3, c. 29.

(1) R. v. Carpenter, 2 Show. 47. 2 Hale, P. C. 280. R. v. Kirdford, 2 East, 561.

(2) See ante, p. 70.

(3) 1 Barn. & Ald. 66. 15 East, 474. But see st. 54 G. 3, c, 170, below stated, which makes inhabitants competent in any matter relating to rates.

(4) 3 G. 4, c. 126, s. 137.

pounds. (1) And by st. 7 & 8 G. 4, c. 29, s. 64, the evidence of any inhabitant of the place, in which offences punishable on summary conviction under that act have been committed, shall be admitted, notwithstanding any penalty or forfeiture incurred by the offence may be payable to the general rate of the place.

54 G. 3, c. 170.

Rated inhabitants.

It has been lately provided by stat. 54 G. 3, c. 170, s. 9, that no inhabitant or person, rated, or liable to be rated, to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained thereby, or executing or holding any office thereof or therein, shall be deemed on such account an incompetent witness, for or against such district, parish, &c., in any matter relating to such rates or cesses, or relating to the boundary between such district, parish, &c., and any adjoining district, &c., or in any matter relating to any order of removal to or from such district, or to the settlement of any pauper in such district, or touching any bastards chargeable or likely to become chargeable to such district, or touching the recovery of any sum for the charges or maintenance of such bastard, or the election or appointment of any officer, or the allowance of the accounts of any officer of any such district. (*p*)

The words of the clause above mentioned, which provide, that no such inhabitant, as is there described, shall be deemed incompetent *in any manner relating to the rates or cesses*, are very general, and have received a large and liberal construction, although they are followed by other terms of a more particular and specific kind. In the late case of Meredith v. Gilpin, (2) an action of trespass against the overseers of a township, where the principal point was, whether the lands in question were vested in the overseers under a local act of parliament, the Court of Exchequer determined, that a rated inhabitant of the township was not an incompetent witness on the part of the defendants, although the lands in question, if vested in the defendants, would be vested in trust for the township and in aid of the poor-rates. The court considered the matter in issue to relate to the rates.

(1) R. v. Davis, 6 T. R. 177. Before this stat. of 27 G. 3, an inhabitant, rated to the poor, would have been incompetent. Portmen v. Okeden, Sayer, 179.

(2) 6 Price, 146. See Rhodes v. Ainsworth, ante, p. 58.

(*p*) See Note 240, p. 254.

Before the passing of this act, it had been determined, on a question of settlement, that the rated inhabitants of either parish could not be compelled to answer against their own parish, because they are in reality the parties to the proceeding; (1) and, for the same reason, the declarations of a rated inhabitant were adjudged to be admissible against his parish. (2) Rated Inhabitant.

Thirdly, persons entitled to rewards on the conviction of offenders, (whether the rewards are given by act of parliament, by proclamation, or by private persons,) and persons entitled to the restitution of their property on the conviction of a thief, (3) are competent to give evidence. (4) Entitled to Rewards.

Fourthly, the admitting of the evidence of agents, servants, and factors, has been considered an exception to the general rule; "for the sake of trade and the common usage of business." (5) And this was, properly speaking, an exception formerly, when interest in the *question* was taken as a test of competency. But now, as the true criterion is, whether a witness is interested in the *event* of the cause, the evidence of agents, servants, and factors, for the purpose of proving contracts made by them on behalf of their principals, would be admitted, under the general rule, and not by way of exception. (*q*) Agents, servants, and factors.

A factor may prove a sale, though he is to receive a poundage on its amount, (6) or what he has bargained for beyond a stated sum. (7) (*r*) And every person who makes a contract for another, is an agent within the meaning of this rule. (8) It is the common practice to admit servants and carriers, to prove the payment or receipt of money, or the delivery of goods on behalf of their master or principal. (9) Thus, if money has been overpaid by a Factor. Servant.

(1) R. v. Woburn, 10 East, 403. See ante, p. 91.

(2) R. v. Whitley Lower, 1 Maule, Selw. 636. In this case the person, whose declarations were offered, was not called as a witness, nor had he refused to give evidence.

(3) By st. 21 H. 8, c 11.

(4) Rudd's case, Leach, Cr. C. 157. 158. Ib. 353, n. Hawk. P. C. b. 2, c. 46, s. 135.

(5) Fortesc. 247. Bull. N. P. 289. By Eyre C. J. 2 H. Bl. 591.

(6) Dixon v. Cooper, 3 Wils. 40. 1 Atk. 248.

(7) Benjamin v. Porteus, 2 H. Bl. 590. R. v. Phipps, Bull. N. P. 289.

(8) 2 H. Blac. 591.

(9) By Holt C. J. in Theobald v. Tregott, 11 Mod. 262. Bull N. P. 239. 4 T. R. 589, 590. Mathews v. Haydon, 2 Esp. N. P. C. 509. Spencer v. Golding, Peake, N. P. C. 129. Adams v. Davis. 3 Esp. N. P. C. 48.

(*q*) See Note 241, p. 254. (*r*) See Note 242, p. 255.

Steward.

servant, or paid by mistake, he is a competent witness, in an action to recover it back. (1) (*s*) So, where the question was on the custom of a manor, whether a fine was due to the lord during his minority on the tenant's admission, the standard of the manor was allowed to give evidence for the lord, though it was objected to him, that he would be entitled to a fee on admission, which he would lose, if the tenant were not admitted. (2)

Agents when not competent.

But though agents and brokers are competent to prove a sale or contract, they are not competent to prove the contract properly executed, in an action against the principal for their misconduct or negligence. Thus, in an action against the defendant for purchasing goods of an inferior quality, Lord Ch. J. Gibbs rejected, as an incompetent witness, the broker of the defendant, who was called to prove that he had purchased goods of the best quality. (3) And where a person has entered into a contract for the purchase of goods in his own name, it has been held that he is not a competent witness, in an action for goods sold and delivered, to prove that he purchased them as the agent for the defendant. (4)

Workmen.

In an action of trespass, where the question is, on a plea of licence, whether the defendant has exceeded what he had the plaintiff's permission to be, the defendant's workmen, employed to do the work, are competent witnesses on his behalf; for though the plaintiff may have a verdict, yet it does not follow that the workmen would be liable, and the verdict would certainly not be evidence against them. (5) (*t*)

Servant when not competent.

Where the act of the servant has been out of the ordinary course of his employment, and a mere breach of duty, the principle does not apply; and it has, therefore been held, that in such a case the servant is not a witness for his master without a release. Thus, in an action to recover back money, which had been intrusted to the plaintiff's servant for a special purpose and paid by the servant in illegal insurances, he was considered

(1) Martin v Howell, 1 Stra. 647. Barker v. Macrae, 3 Campb. 144.
(2) Champain v. Atkinson, 3 Keb. 90. Rep. temp Hard. 360.
(3) Gevers v. Mainwaring, 1 Holt, N. P. C. 138, and see ante, p. 56.
(4) M'Braine v. Fortune, 3 Campb. 317.
(5) Cuthbert v. Gostling, 3 Campb. 515.

(*s*) See Note 243, p. 255. (*t*) See Note 344, p. 256.

incompetent without a release. (1) And in an action against the defendant for the negligence of his servant, the servant is not competent to disprove the fact of his negligence: (2) for since the verdict might be given in evidence in an action by the defendant against the witness, as to the quantum of damages, the servant is directly interested to defeat the action. (*u*)

Sect. VIII.

Of the Means by which the Competency of an interested Witness may be restored.

The last question that remains to be considered, on this part of our subject, relates to the regular mode of making the objection (*v*) to the competency of a witness, and the means of restoring his competency.

Objection when taken.

The rule formerly was, that the objection ought to be made on the voire dire, and, if made after the examination in chief, it would not have the effect of excluding the witness; though, even then, his incompetency might be shown in another stage of the proceeding, for the purpose of impeaching the witness' credit. (3) But for the convenience of the court, and because the incompetency may not at first be suspected, a greater latitude has been since allowed. And now, if it is discovered during any part of the trial, that a witness is interested, his evidence will be struck out. (4) (*w*)

How raised.

The party, against whom a witness is called, may examine him respecting his interest on the voire dire, (*x*) or may call another witness, and produce other evidence, in support of the objection. (*y*) The old rule is said to have been, (5) that, if the witness

(1) Corking v. Jarrard, 1 Campb. 37. In Clarke v. Shee, Cowp. 199, which was a similar case, a release was given. See anonymous case, 1 Salk. 289; Bull. N. P. 39, 289, S. C.; and anonymous case, Bull. N. P. 280. These were actions by a master to recover property embezzled by his servant, and the servant was admitted a witness to prove delivery to the defendant; but it does not appear whether the plaintiff gave a release.

(2) Green v. New River Company, 4 T. R. 589. Bird v. Thompson, 1 Esp. N. P. C. 339. Miller v. Falconer, 1 Campb. 251. 6 Esp. N. P. C. 73.

(3) See Ld. Lovat's case, 9 St. Tr. 646. fol. ed. S. C. 18 Howell's St. Tr. 596.

(4) Turner v. Pearce, 1 T. R. 720. Perigal v. Nicholson, 1 Wightwick, 64. Howell v. Lock, 2 Campb. 14.

(5) By Lord Hardwicke, in Lord Lovat's case, 9 St. Tr. 647, fol. ed. S. C. 18 Howell's St. Tr. 596.

(*u*) See Note 245, p. 256. (*v*) See Note 246, p. 256. (*w*) See Note 247, p. 256. (*x*) See Note 248, p. 257. (*y*) See Note 249, p. 958.

were examined by the opposite party as to the fact of the objection, and denied it upon his oath, the party would not be at liberty to call afterwards another witness to prove it, in order to repel him from giving evidence, unless the other side acquiesced. (*z*) But the modern and more convenient practice seems to be, that if the fact of interest is satisfactorily proved, the witness will be incompetent, though he may have ventured to deny it on the voire dire. (*a*)

Examination on *voire dire.*

A witness may be examined, on the voire dire, as to the contents of a will or deed, or other written instrument, under which he is supposed to acquire an interest in the subject matter of the suit. (*b*) The general rule, which requires a notice to be given for the production of a written instrument, before a witness can be allowed to speak to its contents, does not apply to such a case; for the opposite party may possibly be ignorant of its existence, and cannot be supposed to know that a particular witness would be called on the other side. (*c*) But if the witness himself produces the very instrument, on which the objection to his competency rests, the instrument ought to be read, as the best proof of the witness' situation. (1)

Objection removed on *v. d.*

When the objection arises from a witness' answer on the voire dire, it may be likewise removed on the voire dire. (*d*) Thus, where, in an action brought by a chartered company, a witness for the plaintiffs admitted, on the voire dire, that he had been a freeman of the company, but added that he was then disfranchised, Lord Kenyon ruled, that it was not necessary to prove the disfrancisement by the regular entry in the company's books, and that the witness was competent. (2) And in a later case, on a question of settlement, where the point for the consideration of the Court of King's Bench was, whether a witness produced by the appellants could be examined, after having admitted in his examination on the voire dire, that he was the occupier of a cottage in the appellant township, but that he had never been charged with or paid any public rate or tax in that township, the court held, that there was no ground for

(1) Butler v. Carver, 2 Starkie, N. P. C. 434.
(2) Butchers' Company v. Jones, 1 Esp. N. P. C. 162. Botham v. Swingler, Peake, N. P. C. 218, 1 Esp. N. P. C. 164, S. C.

(*z*) See Note 250, p. 258. (*a*) See Note 251, p. 259. (*b*) See Note 252, p. 260.
(*c*) See Note 253, p. 260. (*d*) See Note 254, p. 260.

objecting to his testimony, and that it was not necessary for the appellants to produce the rate, in order to negative the rating. (1) In another case, where a witness was objected to as next of kin, in an action by an administrator, but on re-examination answered, that he had released all his interest, this was held by Lord Ellenborough to remove the objection. (2) (*d*)

Removed by other evidence.

The objection, in the cases last cited, arose from the examination on the voire dire, and was removed also on the voire dire. But when the party who calls a witness, attempts to remove the objection by other independent proof, and not on the voire dire, he will then be subject to all the general rules of evidence; and the best proof will be requisite, according to the nature of the case. Thus, if another witness is called, to prove that the witness, supposed to be interested, has been released; he cannot be allowed to speak of the contents of the release, but the release itself, if in existence, ought to be produced. (3) The same rule has been laid down by Lord Kenyon in another nisi prius case. (4) (*e*)

Release.

Whatever interest a witness may have had, if he is divested of it by release (*f*) or payment (*g*) or any other means, (*h*) when he is ready to be sworn, (*i*) there is no objection to his competency. Thus, it is said "to have been solemnly agreed by the judges, that where a person had a legacy given him and did release it, he was a good witness to prove the will." (5) * (*j*)

(1) R. v. Gisburn, 15 East, 5.
(2) Ingram v. Dade, Lond. Sitt. after Mich. T. 1817.
(3) Corking v. Jarrard, 1 Campb. 37.
(4) Botham v. Swingler, 1 Esp. N. P. C. 164.
(5) Vin. Ab. tit. Evidence, 14, n. 53, cited by Lord Mansfield, 1 Burr. 423.

* Lord Chancellor Hardwicke established the will of Lord Ailesbury on similar proof, in the year 1748. (See 1 Burr. 427.) And in Wyndham v. Chetwynd (1 Burr. 414,) where the subscribing witnesses were creditors of the testator, as their debts had been paid, they were admitted to prove the will. So in Doe dem. Hindson v. Kersey, (4 Burn Ec. Law, 97,) three of the judges were of opinion, that a subscribing witness was restored to his competency, if all his interest had been released or extinguished at the *time of the examination*. Lee C. J. in Anstey v. Dowsing (2 Str. 1253,) and Ld. Camden C. J., in Doe, on the demise of Hindson v. Kersey, were of opinion, that if a subscribing witness was interested at *the time of attestation*, nothing *ex post facto* could give effect to his attestation. In the former of these cases, Justice Dennison differed from Lee C. J. on this point (See 1 Burr. 427, 428.)

(*d*) See Note 255, p. 260. (*e*) See Note 256, p. 260. (*f*) See Note 257, p. 261. (*g*) See Note 258, p. 264. (*h*) See Note 259, p. 264. (*i*) See Note 260, p. 266. (*j*) See Note 261, p. 266.

Release.

To partners.

The interest which a partner of either party has, to enforce a contract to which, as a partner, he is jointly liable, or to disprove the breach of such contract, cannot be removed by a release given with a view to the particular action. (1) (*k*)

Of all causes of action.

A general release of all actions and causes of action, for any matter or thing which has happened down to the time of the release, will discharge the witness from all liability depending upon the event of the existing suit. Such a release from a defendant, who had drawn a bill of exchange, to the witness, who accepted it, was held to have this effect; (2) for, as Lord Ellenborough said in that case, the transaction was already past, which was to lay the foundation of future liability; and if the drawer should have a cause of action against the acceptor, it would have reference back to the acceptance, and would be discharged by the release. A similar point arose in the case of Cartwright v. Williams; (3) where the defendant was the acceptor, and the witness was one of the drawers, for whose accommodation the bill had been accepted ; there the witness was a bankrupt, and it was objected that a release from the assignees was necessary in addition to the general release, since the defendant, as surety, might prove the debt under the commission of the witness, in case the plaintiff should recover in this action; but Lord Ellenborough held, and the Court of King's bench were afterwards of the same opinion, that the release in question, comprehending all future claims in consequence of any cause existing at the time of granting the release, would extend to bar any claim of the defendant as surety on the bill, his being an inchoate cause of action then existing. (*l*)

By minor.

Co-obligee.

In an action against a minor who appears by his guardian, a release by the guardian will not be sufficient, the guardian not having any authority to release. (4) (*m*) A release of a bond debt by one of several obligees will operate as a release by all;(5) (*n*) and a release to one of several obligors will have the same effect as to all the others, whether the bond be joint, or joint and several. (6) (*o*)

(1) Simons v. Smith, 1 Ry. Mo. 29.
(2) Scott v. Lifford, 1 Campb. 249.
(3) Starkie, N. P. C. 342.
(4) Fraser v. Marsh, 2 Starkie, N. P. C. 41.
(5) Bayley v. Lloyd, 7 Mod. 250.
(6) Co Lit. 252. a. 2 Roll. Ab. 412. (G.) 1 Bos. & Pul. 630.

(*k*) See Note 262, p. 266. (*l*) See Note 263, p. 267. (*m*) See Note 264, p. 268. (*n*) See Note 265, p. 269. (o) See Note 266, p. 269.

Release

In forgery and uttering.

Maker.

On a trial for forgery, a release from the holder of a promissory note to the supposed maker, in whose name it was forged, (there being no other name on the note, to whom the maker could be liable,) made him a competent witness to prove the forgery of his hand-writing, against the prisoner who had passed it off to such holder without any indorsement. (1) And he will be competent, though the note was not payable to order or to bearer, so as to be negotiable, but simply to the prisoner, if the prisoner passed it to the owner for full value. (2)

Acceptor.

On an indictment against the drawer of a bill, the supposed acceptor is made competent by a release from the holder; in case the drawer has received value for the bill from such holder. (3)

On an indictment against the payee of a bill for forging an acceptance, the supposed acceptor is made competent by a release from the first indorsee; though the indorsee advanced to the payee only part of the amount of the bill: the indorsee also in such case is competent. (4)

Indorser.

But the supposed indorser (and payee) is not rendered competent by a release from the holder who has not given value for it; for he has no interest in the bill, and the prisoner appearing the holder, a release from any other person would not be effectual. (5)

Drawer.

Where the forgery consists in altering a genuine instrument, so as to give it a better credit, but does not vary the responsibility of the drawer or maker, the drawer or maker is a competent witness to prove the forgery. This has been held in a case, where the forgery introduced a new place for payment. (6) (*p*)

Residuary legatee.

A residuary legatee is not rendered a competent witness, in an action by an executor to recover a debt due to the testator, by

(1) Akehurst's case, 1 Leach, Cr. C. 178. Dr. Dodd's case, ib. 184.

(2) See Akehurst's case, supra: and Bayley on Bills, 4th ed. 451.

(3) R. v. Peacock, Russ. Ry. Cr. C. 278.

(4) R. v. Mott, Bayley on Bills, 4th ed. 451, 452. Russ. & Ry. Cr. C. 435, S. C.

(5) R. v. Young, Worc. Lent Ass. 1805, MS. Russ. Ry. Cr. C. 280, S. C. in note.

(6) R. v. Treble, Bayley on Bills, 455.

(*p*) See Note 267, p. 269.

Release

releasing all claim to the debt in question; for if the plaintiff fail in the suit, although he would not be liable for costs to the opposite side, he must pay costs to his own attorney. (1) The executor would be entitled to the allowance of these costs out of the estate, the action being brought *bona fide;* and thus independently, of the debt to be recovered, the residue would be diminished. The witness, therefore, has still an interest to support the action and can only be rendered competent by releasing the residue, or, by release of the costs of the action from the attorney. (*q*)

Member of Corporation.

When a witness is objected to as a member of a corporation, whose interests are questioned, his competency may be restored either by his resignation, (which will be effectual even by parol. Provided it has been accepted, and another person elected in his place,) (2), or by disfranchisement. The method of disfranchisement is said to be by an information in the nature of a quo warranto against the member, who then confesses the information, and upon that there is judgment of disfranchisement. (3) This judgment must be such as cannot be avoided; for if it appear that the witness can avoid the judgment for irregularity, (as he may, if he has never been summoned, and knew nothing of his disfranchisement,) he is not competent. (4)(*r*)

Bail.

The defendant's bail are not competent to give evidence for their principal. (5) To restore their competency, the defendant must apply to the court, on an affidavit stating that the bail will be a material witness for him, to have his name struck out of the bail piece on adding and justifying another in his place. (6) (*s*)

Release, when unnecessary.

A release is in some cases unnecessary, and the witness though interested will be admitted without a release.

1. Offer to release.

1. First, where the witness offers to surrender or release his interest, and does all in his power to clear away every objection

(1) Baker v. Tyrwhitt, 4 Campb. 27.
(2) R. v. Mayor, &c. of Ripon, 2 Salk. 432. Com. Dig. tit. Franchise (F. 30.)
(3) The case of the Mayor, &c. of Colchester, 1 P. Wms. 595, n.
(4) Brown v. Corp. of London, 11 Mod. 225.
(5) Vide supra, p. 59.
(6) Tidd, Pr. 264. Colletty, Jennis, Rep. temp. Hard. 133.

(*q*) See Note 268, p. 269. (*r*) See Note 269, p. 270. (*s*) See Note 270, p. 270.

to his testimony, but the other party refuses to accept the release, in that case the evidence of the witness may be received. (1) (*t*) Or if the party, on whose side the witness is interested makes an offer to remove all interest, and the witness refuses, that will not deprive the party of his testimony. (*u*)

Legatee.

In the case of Anstey v. Dowsing, (2) indeed, Lee C. J. expressed an opinion, that a legatee was not competent to prove the due execution of the will, although payment of the legacy was tendered to him, which tender he refused. But the ground of this opinion was, that, even, if he had accepted the legacy, he still would have been incompetent, as having been interested at the time of attestation; a point, on which there has been some difference of opinion, but the greatest authorities are in support of the contrary proposition, namely, that the payment of the legacy would restore the competency of the witness. (3)

Payment.

2. Interest acquired fraudulently.

If a witness has acquired an interest in the subject-matter, for the mere purpose of depriving the party to the suit of the benefit of his testimony, this ought not to exclude him from giving evidence. It was ruled by Lord Holt in the case of Barlow v. Vowel, (4) that if a man be a witness of a wager, and afterwards bet himself, this shall not be a reason to except against his being sworn to prove the wager. And from analogy to this case, Lord Kenyon and Mr. Justice Ashhurst were of opinion in the case of Bent v. Baker, (5) (where, on the trial of an action on a policy of insurance, the broker had been called as witness for the defendant, but rejected, because he had underwritten the policy after the defendant,) that even if it were true in general, that one underwriter could not be a witness for another, yet the witness ought to have been admitted in that case, as the defendant had acquired an interest in his testimony before the witness had signed the policy. And they laid down as a general principle, deducible from the case of Barlow v. Vowel, that where a person makes himself a party in interest after a plaintiff or defendant

Wager.

(1) Goodtitle dem. Fowler v. Welford, 1 Doug. 139. 3 T. R. 35.
(2) 2 Str. 1253. Vide supra, p. 133, n.
(3) Vide Supra, p. 133, n.
(4) Skin. 586. See Rescous v. Williams, 3 Lev. 152, and Cowp 736.
(5) 3 T. R. 27. Vide supra, p. 48.

(*t*) See Note 271, p. 272. (*u*) See Note 272, p. 272.

has an interest in his testimony, he may not by this deprive the plaintiff or defendant of his testimony.

Interest acquired since cause of action.

However, it appears to be rather doubtful, whether this proposition is not expressed in too large and general terms. The incompetency of a witness, on account of interest, must depend rather on the nature of the interest, than upon the time of acquiring it. The question on the *voire dire* is, whether he is interested at the time of his examination. If he is directly interested at that time, he is not a competent witness in general without a release, and it seems to be no answer to the objection, to show that he has become interested only since the commencement of the action, or since the time of his being acquainted with the fact, which he is called to prove. If, for example, the question is on a customary right of common, a witness will be incompetent, who admits upon the voire dire, that he is in the occupation of a messuage, and that he claims a similar right of common as annexed to his tenement; and it cannot be material, whether he has been in possession for a number of years, or had the tenement only just before the trial of the cause. In either case he appears to be equally incompetent: yet in the latter it may be said, that he acquired his interest, after the party had become interested in his testimony. The case of Barlow v. Vowel must be considered as having determined on the ground of fraud: the witness, proposed to be examined, was the original witness of the wager; it was a fraud, therefore, to deprive the party of the benefit of his testimony. (1)

Underwriter having paid.

In the late case of Forester v. Pigou, (2) where the defendant in an action on a policy of insurance, called another underwriter to prove the policy void on account of a misrepresentation of the nature of the risk, and upon the voire dire the witness stated, "that he had paid the loss to the plaintiff, upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff promising to return the money in that event," an objection was taken to his competency, on the ground of his

(1) By Lord Ellenborough in Forester v. Pigou, 1 Maule & Selw. 9, in which this case was much cited.

(2) 3 Campb. 380. 1 Maule & Selw. 9, S. C.

being interested in the event; the point was argued on the other side upon the authority of Barlow v. Vowel, and it was said, the witness had not become interested until after the commencement of the action, and that the plaintiff ought not to be allowed to defeat by his own act the interest which the defendant had in the witness' testimony; but the witness was considered to be incompetent and rejected: for although the witness would not be disqualified by any agreement *fraudulently* entered into between him and the plaintiff for the purpose of taking off his testimony, yet on the other hand the pendency of a suit could not prevent third persons from transacting business *bona fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. A motion was afterwards made for a new trial, on account of the rejection of this witness, as well as of another also, who was similarly situated; and a new trial was granted for the purpose of ascertaining more particularly the precise time, when the undertaking was made to the witnesses; but the court added, that, if a person, who is under no obligation to become a witness for either of the parties to a suit, choose to pay his debt beforehand, upon a condition that is to be determined by the event of the suit, he becomes as much interested in the event, as if he were a party to a consolidation rule. (*v*)

Wager, on conviction.

Lord Raymond, in the case of the King v. Fox, (1) admitted the prosecutor to be a witness, although he had laid a wager, that he should convict the defendant: and the true reason seems to be, not because the witness had made the wager at a time when public justice became interested in his testimony, but because it would be against public policy to allow a witness by any such gratuitous act to exclude himself from giving evidence. In addition to this, it may be observed, that the wager would now probably be considered absolutely void, on a principle of public policy, as tending to produce an improper bias on the mind of the witness, and therefore as directly prejudicial to the administration of justice.

(1) 1 Str. 652.

(*v*) See Note 273, p. 272.

3. Witness indifferent.

3. When the witness must be answerable to one or the other of the parties, and the event of the suit determines only to which, he may be examined by either of them without a release. Thus, in an action of assumpsit for money paid to the use of the defendants, who were ship-owners, Lord Kenyon admitted the captain to prove, that he had received the money from the plaintiff for the defendant's use; for he stood indifferent between the parties, and he was equally answerable, whichever way the verdict might go. (1) (*w*)

(1) Evans v. Williams, 7 T. R. 481, n. (*c.*)

CHAP. VI.

Of the Admissibility of Counsel or Solicitor.

The objections to the competency of a witness, which have been considered in the four preceding chapters, are of a nature to exclude him from giving any kind of evidence. One other objection still remains to be considered: not an objection to his general competency, but to particular evidence, which he may be called upon to disclose. This is founded on the professional confidence, which a client reposes in his counsel, attorney, or solicitor, and which courts of justice ever hold to be inviolable. (2)

General rule.

Confidential communications between attorney and client are not to be revealed at any period of time; (*x*) not in an action between third persons—nor after the proceeding, to which they referred, is at an end—nor after the dismissal of the attorney. (3) The privilege of not being examined to such points, as have been communicated to the attorney while engaged in his professional capacity, is the privilege of the client, not of the attorney; and it never ceases. (*y*) "It is not sufficient

(2) Lord Say and Seale's case, 10 Mod. 40. Bull. N. P. 284. Cuts v. Pickering, 1 Ventr. 197. The reader may see some very judicious observations on this subject in Burnet's Treatise on the Criminal Law of Scotland, p. 435—438.

(3) Wilson v. Ratstall, 4 T. T. 759, 760. Sloman v. Herne, 2 Esq. N. P. C. 695. R. v. Withers, 2 Campb. 578. Gainsford v. Grammar, 2 Campb. 10. Parkhurst v. Lowten, 2 Swanst. 197—221.

(*w*) See Note 277, p. 275. (*x*) See Note 275, p. 275. (*y*) See Note 276, p. 276.

to say, the cause is at an end; the mouth of such a person is shut forever." (1)

Privilege waived.

If the client waive his privilege, the attorney may be examined. In an action by the assignees of a bankrupt, communications, made by him to his attorney before his bankruptcy, were admitted in evidence, the bankrupt himself being present and consenting. (2) (*z*)

Deed or writing deposited.

An attorney will not be allowed to produce a deed which has been deposited with him confidentially in his professional character: and if the deed has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus in a case, tried before Mr. Justice Bayley, (3) the plaintiff's counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel for the plaintiff offered in evidence a copy of the deed, which had been obtained from one who acted many years ago as attorney for the person, under whom the defendant claimed, and who had been entrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected, that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney; and Mr. Justice Bayley refused to admit it. He said, "The attorney could not give parol evidence of the contents of the deed, which had been entrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a writing or a verbal communication. It is the privilege of his client, and continues from first to last.

In cause between third persons.

As a witness cannot be bound to produce his title deeds to an estate, so neither can his solicitor produce them, in a cause between third persons. Upon the same principle it has been held, that a solicitor of one of the parties to a deed of composition, between a company of water-works and their creditors, is not compellable to produce it; he demurred to the production, con-

(1) By Buller J. 4 T. R. 759.
(2) Merle v. Moore, Ry. Mo. 390.
(3) Fisher v. Heming, Leic. Lent Ass. 1809. Brard v. Ackerman, 5 Esp. N. P. C. 119. See Copeland v. Watts, 1 Starkie, N. P. C. 95.

(*z*) See Note 277. p. 276.

ceiving that it might prejudice his client. (1) And a solicitor to assignees of a bankrupt is not compellable to produce the proceedings under the commission, the assignees having a cause pending against the defendant, which might be prejudiced by a disclosure, though not connected immediately with the cause on trial. (2) A retainer to counsel for a cause is strictly a privileged communication. (3) (*a*)

Rule in prosecutions.

The following instance, which occurred before Mr. Justice Holroyd, (4) shews, how strictly the obligation of secrecy is enforced, between attorney and client, even in a case where the interests of criminal justice were concerned. In a prosecution for the forgery of a promissory note, an attorney, who had the note in his possession, refused to produce it before the clerk of arraigns, who required it for the purpose of setting it out in the indictment: upon which, he was summoned to appear before the judge, and show cause why he should not produce the note. He accordingly attended, together with counsel for the prosecution, and counsel for the prisoner. Mr. Justice Holroyd inquired minutely into the circumstances, by which he had the note in his possession; when, it appeared, on the statement of the attorney, that he had been consulted by the prisoner on the note in question, and that by his direction he had commenced an action, to recover the amount of the note, against the person in whose name it was now supposed to be forged: that a short time afterwards, he had been summoned before a magistrate, when the prisoner was apprehended on a charge of forgery, and he was then desired to produce the note: upon this, he inquired of the prisoner, who was present, whether he would consent to its being produced: the prisoner consented, asserting his innocence, and the note was accordingly produced. The magistrate, after taking the depositions of witnesses, remarked, that he thought it would be proper to deposite the note in the hands of the high constable: on which the attorney said, that as the note had come into his hands professionally from his client he expected to have it restored to him, at the same time asking

(1) Norris v. Hill, 3 Stark. N. P. C. 140.
(2) Laing v. Barclay, 3 Stark. N. P. C. 42.
(3) Foote v. Haynes, 1 Ry. Mo. 165.
(4) R. v. Smith, Derby Sum. Ass. 1822. In support of this decision, See R. v. Dixon, 3 Burr. 1687.

(*a*) See Note 278, p. 276.

the prisoner, whether he would consent to its being deposited with the high constable, and the prisoner replied, he wished it to be placed in the hands of his attorney. The magistrate returned the note to the attorney, observing, that he would doubtless have notice to produce it at the trial. The attorney (who was not, however, employed professionally for the prisoner in the ensuing trial,) had been subpœnaed to produce the note, which was still in his possession: but, before he was subpœnaed, a demand of the note had been made upon him by the attorney now employed in the prisoner's defence. On these facts the question was argued by the counsel for the prosecution, and the counsel for the prisoner; and Mr. Justice Holroyd said, he would consider the point. On the following day the subject was again mentioned, when Mr. Justice Holroyd refused to make an order upon the attorney to produce the note, or to give a copy of it, to the clerk of arraigns. A bill, charging the prisoner with forgery, was prepared, and found by the grand jury. At the trial, the same attorney was called, on the part of the prosecution, for the purpose of producing the note; and on his re-stating the facts above detailed, the learned judge declared his opinion, that he ought not to produce it. Secondary evidence of its contents was not offered; the prosecution consequently failed; and the prisoner was acquitted. (*b*)

Extent of rule.

This privilege of the client has not been confined to those cases only where the attorney has been employed about a suit or cause, but has been extended to all such communications as were made to him in his professional character, and with reference to professional business. Thus, if an attorney were professionally employed to make a draft of an assignment of goods, which, however, he declined to make, it has been held that he would not be allowed to disclose that circumstance, in case a question should arise, whether an assignment, subsequently drawn by another attorney, was fraudulent: (1) and if he were to be consulted on the title to

(1) Cromack v. Heathcote, 2 Brod. & Bing. 4. 4 J. B. Moore, 357, S. C. Gainsford v. Grammar, 2 Camph. 9. But see Wadsworth v. Hamshaw, 2 Brod. & Bing. 5, in note, and Williams v. Mundie, 1 Ry. & Mo 34, where Abbott, C. J. laid down the rule to be, that what is communicated for the purpose of bringing an action or suit, or relating to a cause or suit existing at the time of the communication, is confidential and privileged; but what an attorney learns otherwise than for the purpose of a cause or suit, he is bound to communicate. And see 2 Barn. & Cress. 749.

(*b*) See Note 279, p. 276.

an estate, that he would not be allowed to disclose any information thus communicated to him, to the prejudice of his client. (1) (*c*)

Interpreter.

Agent.

A person who acts as interpreter, (2) or agent, (3) between an attorney and his client, stands precisely in the same situation as the attorney himself; he is considered as the organ of the attorney, and is under the same conditions of secrecy. (*d*) But it has been ruled at Nisi Prius, that a person who was consulted confidentially on the supposition of his being an attorney, when in fact he was not one, is compellable to answer. (4)

Rule confined to professional advisers.

This professional privilege extends to the three enumerated cases of counsel, solicitor, and attorney; but it is confined to those cases alone. (5) There are, indeed, cases, said Mr. Justice Buller, in the case of Wilson v. Rastall, to which it is much to be lamented that the law of privilege is not extended; those, in which medical persons are obliged to disclose the information, which they have acquired by attending in their professional characters. (6) This point was much considered in the Duchess of Kingston's case, where Sir C. Hawkins, who had attended the duchess as a medical man, was compelled to disclose what had been committed to him in confidence. (7) Lord Kenyon in the same case of Wilson v. Rastall, observed, "If a friend could not reveal what was imparted to him in confidence, what is to become of many cases, even affecting life, for instance Doctor Ratcliff's case? (8) And if the privilege, now claimed, extended to all cases and persons, Lord W. Russel died by the hands of an assassin, and not by the hands of the law; for his friend Lord Howard was permitted to give evidence of confidential conversations between them. (9) All good men, indeed, thought that

(1) 2 Brod. & Bing. 6, by Richardson, J.

(2) Du Barre v. Livette, Peake, N. P. C. 78, cited by Lord Kenyon, 4 T. R. 756.

(3) Parkins v. Hawkshaw, 2 Stark. N. P. C. 239 In this case the agent for the defendant's attorney was proposed to be examined as to communications which he had with the defendant, for the purpose of proving the identity of the party in an action on a bond, but rejected by Holroyd, J.

(4) Fountain v. Young, 6 Esp. N. P. C. 113.

(5) 4 T. R. 758, Vaillant v Dodemead, 2 Atk. 524. 2 Swanst. 221.

(6) 4 T. R. 759. See also R. v. Sparkes, cited in Peake, N. P. C. 77, Du Barre v. Livette.

(7) 20 Howell's St Tr. 613, 614.

(8) 9 St. Tr. 582, fol. ed. S. C. 18 Howell's St. Tr. 428.

(9) 3 St. Tr. 715, fol. ed. S. C. 9 Howell's St. Tr. 599.

(*c*) See Note 280, p. 277. (*d*) See Note 281, p. 278.

he should have gone almost all lengths rather than have betrayed that confidence; but still, if the privilege had extended to such a case, it was the business of the court to interfere, and prevent the evidence being given.

Clerk to commissioners.

In a case at Nisi Prius, where a clerk to the commissioners of the property-tax was called to prove the defendant a collector, and refused to give evidence, on the ground of his having taken an oath of office not to disclose what he should learn as clerk respecting the property-tax, except with the consent of the commissioners, or by force of an act of parliament, the court held, that this oath would not exempt the witness, and that it must be construed, as containing an implied exception of the evidence, which he might be called to give in courts of justice, in obedience to the writ of subpœna. (1) In an early case, (2) indeed where the defendant pleaded, to an action of debt on a bond, the statute against buying and selling of offices, and called a witness to show on what occasion the bond was given, Lord Holt is said to have refused his evidence, because it appeared, that he was privately intrusted to make the bargain, and keep it secret. But the principle and authority of this case seem to have been overruled by that of Wilson v. Rastall, and the latter decisions on this subject. (*e*)

Oath of office.

Attorney not employed as such.

A person, by profession an attorney, but not employed as attorney in the particular business, which is the subject of inquiry, is not within the rule, although he may have been consulted confidentially. (3) (*f*)

Terms offered before third person.

Propositions, which the attorney of one party has been professionally employed to make to the adverse party, and which he made in the presence of a third person, though they are not to be disclosed by the attorney himself, may yet be proved by the person, who heard him deliver them. (4) (*g*)

Attorney examinable, to what.

The attorney of a party in the cause may be examined, like

(1) Lee q. t. v. Birrel, 3 Campb. 337.
(2) Bull. N. P. 284.
(3) Wilson v. Rastall, 4 T. R. 753, 760.
(4) Gainsford v. Grammar, 2 Campb. 10.

(*e*) See Note 282, p. 278. (*f*) See Note 283, p. 280. (*g*) See Note 284, p. 281.

any other witness, as to a fact which he knew before the retainer, that is, before he was addressed in his professional character; (1) or, where he has made himself a party to the transaction; (2) or, where he is questioned to a collateral fact within his own knowledge, or to a fact which he might have known without being intrusted as attorney in the cause. (3) (*h*) Thus, if he is a subscribing witness to a deed, he may be examined concerning the execution. (4) (*i*) Or, if there be a question about an erasure in a deed or will, he may be asked, whether he had ever seen the instrument in any other state, for it is a fact within his own knowledge; but he ought not to be permitted to disclose any confessions, which his client may have made to him on the subject. (5) Or, if an attorney were present, when his client was sworn to an answer in chancery, he might be a witness, on an indictment for perjury, to prove the fact of taking the oath, which is a fact not peculiarly within his knowledge as an attorney, and not committed to him in secrecy. (6) So, the attorney of one of the parties may be examined as to the contents of a written notice, which had been received by him in the course of the cause, requiring him to produce papers. (7) (*j*)

Execution.

Erasure.

Swearing.

Notice.

Usury.

On the same principle, in an action of debt upon a bond, the plaintiff's attorney was admitted by Lord Kenyon to prove, that the bond had been given on an usurious consideration. (8) . And where a person (who had brought an action on a promissory note, which was afterwards compromised by the defendant,) had informed the attorney after the compromise, that there never had been any consideration for the note, the Court of King's Bench held, that the attorney was compellable to disclose that circumstance, in an action brought to recover back the money. (9) The communication, said Lord Kenyon, was not here made in

Consideration.

(1) Cuts v. Pickering, 1 Vent. 197. Lord Say and Seale's case, 10 Mod. 40; S. C. Bull. N. P. 284. 4 T. R. 759.

(2) Duffin v. Smith, Peake, N. P. C. 108. Robson v. Kemp, 5 Esp. N. P. C. 52. Cowp. 845.

(3) Bull. N P. 384. By Lord Mansfield, C. J. in Duchess of Kingston's case, 11 St. Tr. 253, fol. ed. S. C. 20 Howell's St. Tr. 612. And See Parkins v. Hawkshaw, stated ante, p. 144.

(4) Doe dem. Jupp v. Andrews, Cowp. 846. Robson v. Kemp, 4 Esp. N. P. C. 235; 5 Esp. N. P. C. 53.

(5) Bull. N. P. 284. 1 Ventr. 197.

(6) Bull. N. P. 284. By Lord Mansfield, C. J. in Cowp. 846.

(7) Spencelcy v. Schullenberg, 7 East, 357.

(8) Duffin v. Smith, Peake, N. P. C. 108.

(9) Cobden v. Kendrick, 4 T. R. 432.

(*h*) See Note 285, p. 281. (*i*) See Note 286, p. 281. (*j*) See Note 287, p. 281.

contemplation of a suit; on the contrary, the purpose in view had been already obtained; and what was said by the client was from exultation, in having before deceived his attorney as well as his adversary.

Opinion as to matter of fact.

Communications which a person has had with an attorney, respecting a meeting of his creditors, and as to his being able to attend without being arrested for debt, are not privileged. (1) "A question for legal advice," said Abbott C. J., "may come within the description of a confidental communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to *matter of fact*, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as an attorney, and where the character or office of attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded."(*k*)

Same rule in cross-examination.

If the attorney of one of the parties to the suit is examined as a witness for his client, the counsel on the other side may cross-examine him as to the same matter, but not as to any other points of the cause; (2) on all such points the privilege of the client seals his lips.

Rules of Roman law.

After taking a view of the law of England, it may not be thought uninteresting to mention, what was the rule of the Roman law, respecting the disqualification of witnesses. The principal rules were the following:—"Admittendi non sunt ad testimonii fidem, qui impuberes erunt: qui judicio publico damnati erunt, et qui eorum in integrum restitutus non erit: quive in vinculis, cutodiave publica erit. Adulterii, aut repetundarum damnatus, et ob testimonium dicendum damnatus vel non dicendum, ad testimonium non adhiberi potest.—Nullus idoneus testis in re sua intelligitur.—Testis idoneus pater filio, aut filius patri, non est.—Lege Julia cavetur, ne invito denuntietur, ut testimonium litis dicat adversus socerum, generum vitricum, privignum, so-

(1) Bramwick v. Lucas, 2 Barn. & Cress. 744.

(2) Valliant v. Dodemead, 2 Atk. 524.

(*k*) See Note 288, p. 281.

brinum, sobrium, sobrino natum, eosve qui priore gradu sunt.—Idonei non videntur esse testes, quibus imperari potest, ut testes fiant: domestici testimonii fides improbatur.—Unius omnimodo testis responsio non audiatur, etiamsi præclaræ curiæ honore fulgeat.—Testes, qui adversus fidem suam testationis vacillant, audiendi non sunt. (1)

The Roman law will appear, in the foregoing regulations, to have been too narrow and restrictive on the question of *incompetency*. Its maxims were much wiser on the subject of the *credibility* of witnesses: "Testium fides (says the Digest,) diligenter examinanda est. Ideoque in persona eorum exploranda imprimis conditio cujusque: utrum quis decurio an plebius sit: et an honestæ et inculpatæ vitæ, an vero notatus quis et reprehensibilis: an locuples vel egens sit, ut lucri causa quid facile admittat: vel an inimicus ei sit, adversus quem testimonium fert: vel amicus ei sit, pro quo testimonium dat. Nam si careat suspicione testimonium vel propter personam, a qua fertur, quod honesta sit—vel propter causam, quod neque lucri, neque gratiæ, neque inimicitiæ causa sit—admittendus est. Ideoque Divus Hadrianus Vivio Varo legato provinciæ Ciliciæ rescripsit, eum qui judicat magis posse scire, quanta fides hadenda sit testibus. Verba epistolæ hæc sunt. Tu magis scire potes, quanta fides habenda sit testibus: qui, et cujus dignitatis, et cujus æstimationis sint: et qui simpliciter visi sint dicere, utrum unum eundemque meditatum sermonem attulerint, an ad ea quæ interrogaveras, extempore verisimilia responderint." (2)

(1) Digest. lib. 2, tit. 4, de Testibus. Domat, b. 3, sect. 3, of Proofs by Witnesses. Huberi Prælect. Jur. Civ. lib. 22, tit. 4, de Testibus.

(2) Digest. lib. 22, tit. 5, art. 3.

CHAP. VII.

Of the principal general Rules of Evidence.

If no objection is made to the competency of a witness, and he is allowed to give evidence, the next question is, what evidence ought to be given; and in what manner is the witness to be examined. It will, therefore, now be necessary to enquire

into certain general rules, which have been established for the purpose of directing the testimony of witnesses, and for the more effectual attainment of the ends of justice.

Some general rules relate to the issue joined between the parties. One of these is, that the evidence, which either party produces, ought to be confined to the points in issue. This is an universal principle or axiom, and admits of no exception. As the true end and object of pleading is to raise the point in issue, so the true aim of evidence must be to hit that point. Every proof ought to bear, directly or indirectly, upon the facts in dispute. And an irrelevant argument is not more unsound in point of reasoning, than irrelevant evidence is in point of proof.

Another general rule is, that the substance only of the issue need be proved. This is founded on the principles of good sense and justice. If a party prove the substance of the issue, he has proved a substantial ground of action, and is entitled to his remedy. He will not be obliged to prove immaterial averments, which might be expunged from the record without affecting his right to recover. Such averments serve only to encumber the record; and the proof of them would be as immaterial as the averments themselves. The former rule, then, co-operates with good pleading; this counteracts defective pleading.

A third general rule is, that the affirmative of the issue ought to be proved. This relates to the person who is to prove the issue, and casts the burthen of proof on the affirming party. It is, however, by no means an universal rule, like the two former, and admits of many exceptions.

The rules, just mentioned, relate to the general aim or tendency of proof, with reference to the issue. There are other rules, relating to the *medium* of proof, independently of the form of the issue. Such is the general rule, that the best evidence which the nature of the case admits, ought to be produced; a rule adopted by courts of justice, as a safeguard and security for the discovery of truth. The rules, before noticed, shew, *what* facts are to be proved; this shews, *how* they are to be proved.

The substance of the issue is not only to be proved, but to be proved by the best evidence.—Another rule, usually classed among the general rules of evidence, and relating, like the last, to the *medium* of proof, is, that hearsay of a fact is not admissible.

The consideration of these rules will form the subject of the present chapter. But before we come to examine them, it will be convenient to inquire, first, in what cases the testimony of a single witness is not sufficient proof of a fact: and, secondly, as to the nature of presumptive evidence.

The order in which it is proposed to consider the subject, is the following:

First, Of the number of witnesses for the proof of a fact:

Secondly, Of the nature of presumptive evidence:

Thirdly, That evidence is to be confined to the points in issue:

Fourthly, That the affirmative of the issue is to be proved:

Fifthly, That the substance only of the issue need be proved:

Sixthly, That the best evidence is to be given, which the nature of the case admits:

Lastly, That hearsay evidence is not admissible.

Sect. I.

Of the Number of Witnesses, for the Proof of a Fact.

General rule.

The general rule of the common law, is, that a single witness, if credible, is sufficient for the proof of any fact. The law of England differs in this respect from the civil law, of which one maxim is, "unius responsio non omnio audiatur;" and by the law of Scotland at this day, the testimony of a single witness is

not lawful evidence to convict. (1) Lord Coke has said in his Commentary, (2) that "when a trial is by witnesses, as in the case of the challenge of a juror or summons of a tenant, the affirmation ought to be proved by two or more witnesses, but, where the trial is by verdict, there the judgment is not given upon witnesses, but upon the verdict, and upon such evidence as is given to the jury they find their verdict." But this distinction has been denied by Lord Holt, (3) and the doctrine is said not to be warranted by the authorities cited in its support.

In deciding upon the effect of evidence, the question is, not by how many witnesses a fact may have been proved, but whether it has been proved satisfactorily, and so as to convince the understanding. The number of witnesses is not more conclusive on matters of proof, than a number of arguments on a subject of reasoning. If the law were in every case to require peremptorily two witnesses, this would by no means ensure the discovery of truth; but it would infallibly obstruct its discovery, wherever a fact is known only to a single witness; and thus secret crimes might escape with impunity. Abstractedly speaking, there cannot be any reason for suspecting the evidence of a witness, because he stands alone. The evidence of a single witness may be so clear, so full, so impartial, so free from all suspicion and bias, as to produce in every mind, even in the most scrupulous, the strongest and deepest conviction. On the other hand, witness may crowd after witness, all asserting the same facts, yet none be worthy of credit. In short, it is the character of witnesses, and the character of their evidence, that ought to prevail, not their number.

By the law of England, however, the testimony of a single witness will not be sufficient in cases of perjury and high treason.

In case of perjury.

On an indictment for perjury, the evidence of one witness is not sufficient to convict the defendant; because then there would only be one oath against another. "To convict a man of perjury," said C. J. Parker, in the case of the Queen v. Muscot, (4)

(1) Hume's Comment. on the Laws of Scotland, 2d vol. 369.
(2) Co. Lit. 6, *b*.
(3) Shotter v. Friend, Carth. 144.
(4) 10 Mod. 193.

"there must be strong and clear evidence, and more numerous than the evidence given for the defendant." It does not appear to have been laid down, that *two witnesses* are necesssary to disprove the fact sworn to by the defendant; nor does that seem to be absolutely requisite. But, at least, one witness is not sufficient; and, in addition to his testimony, some other independent evidence ought to be produced. (*l*)

In case of treason.

It was enacted, for the security of the subject, by stat. 1 Ed. 6, c. 12, s. 22, that "no person shall be indicted, arraigned, condemned, or convicted for any offence of treason, petit treason, misprision of treason, unless the offender be accused by two sufficient and lawful witnesses, or willingly, without violence, confess the same." It has generally been thought, that a single witness would have been sufficient, at common law, on the trial of those offences; (*m*) and this stat. of Ed. 6, is the first act of the legislature by which two witnesses are specially required. (1) A similar provision is contained in the stat. 5, 6 Ed. 6, c. 11, s. 12, which enacts, that "no person shall be indicted, arraigned, condemned, convicted, or attainted for any of the treasons or offences in that act mentioned, or for any treasons which then were or hereafter might be, unless the offender be accused by two lawful accusers, who, at the time of the arraignment of the party accused, if living, shall be brought in person before the party accused, and avow and maintain what they have to say against the party, to prove him guilty of the treasons contained in the bill of indictment; unless the party arraigned shall willingly, without violence, confess the same." (2)

5, 6 Ed. 6, c. 11.

Thus it appears that two witnesses would at that time have been necessary, not only in trials for high treason, petit treason, and misprision of treason, but also in treasons relating to the coin of the kingdom. But an alteration in this respect was made by the stat. 1, 2 Ph. & Mary, c. 10, st. 12, and 1, 2 Ph. & Mary, c. 11, s. 3, which provided, that "in all cases of high treason concerning the current coin, or for counterfeiting the

Relating to coin.

(1) Foster C. L. 233. Sir E. Coke was of opinion, that one witness was not sufficient to convict of treason by the ancient common law. See 3 Inst. † 25.

(2) See 3 Inst. 25. Fost. Cr. L. 234, 237.

(*l*) See Note 289, p. 283. (*m*) See Note 290, p. 284.

king's signet, privy seal, and great seal, or sign manual, and on trials for bringing counterfeit coin into the realm, or for any offence concerning the impairing, counterfeiting, or forging the current coin, the prisoners should be tried by the same evidence, as they were before the reign of Edward the Sixth." (1) In these cases, therefore, a single witness will now be sufficient; and it has been agreed by all the Judges, that these statutes extend to all offences, touching the impairing of the coin, which should afterwards be made treason. (2)

The stat. 7, 8 W. 3, c. 3, which relates only to such treasons as induce corruption of blood, enacts in the second section, that "no person shall be indicted, tried, or attainted of that species of high treason, or of misprision of such treason, but by the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted and tried shall willingly, without violence, in open court, confess the same, or shall stand mute, or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury." And by the 4th section it is enacted, "If two or more distinct treasons of divers heads or kinds are alleged in one indictment, one witness produced to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be deemed to be two witnesses to the same treason within the meaning of this act." (*n*)

7, 8 W. 3, c. 3.

Rule as to two witnesses.

s. 4.

Long before this act of the 7th and 8th of William, it had been resolved, at a conference among the Judges, preparatory to the trial of the Regicides, (3) that one witness to prove one act tending to the compassing of the king's death, and another witness to prove another act tending to the same end, were sufficient, and that there need not be two witnesses to prove every overt act tending to the compassing of the king's death. And at the trial of Lord Stafford; (4) all the Judges present delivered their opinions upon the same point, and declared that one wit-

(1) The like provision in statute 8, 9 W. 3, c. 26, s. 7, and stat. 6 G. 3, c. 53, s. 3.

(2) Gahagan's case, 1 Leach, Cr. C. 50. 1 East, P. C. 129, S. C.

(3) Kelyng, 9.

(4) Sir T. Raym. 407. 7 Howell's St. Tr. 1527.

(*n*) See Note 291, p. 284.

ness to one overt act, and another to another overt act of the same species of treason, were two sufficient witnesses within the statute. From that time the rule has been considered as completely settled; and on many occasions, which occurred before the act of the 7th of William, it was strictly followed. (1)

Some alteration has been since made in the worst species of high treason, where an attempt is made on the king's person; and in that case the principle and mode of proceeding at common law are restored. The stat. 39, 40 G. 3, c. 93, enacts, that "in all cases of high treason, when the overt act alleged in the indictment is the assassination of the king, or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial, and upon the like evidence, as if he stood charged with murder." A conviction, therefore, in such a case, may proceed on the testimony of a single witness.

39, 40 G. 3, c. 93.

The language of the statutes of Edward 6, is, that "the offenders are to be accused by two witnesses," that is, two witnesses are required to prove the offence or overt act of treason; and the stat. of W. 3, expressly confines itself to the proof of the overt acts. With respect to all other acts, therefore, which are merely collateral and not conducive to the proof of the overt acts, the rule of the common law is not altered, and one witness is still sufficient. (2)

Collateral facts.

Rule in courts of equity.

It is an established principle in courts of equity, that on a bill praying relief, when the facts charged by the plaintiff, as the ground for obtaining a decree, are proved only by a single witness, and are *clearly* and *positively* denied by the answer of the defendant, the Court will not grant a decree against the defendant. (3) (o) But where the evidence produced by the plaintiff is so far supported and corroborated by proof of concurring circumstances, as to outweigh the denial in the defendant's answer, (4)

(1) See Fost. Cr. L. 286, and Sir W. Parkyns' case, 4 St. Tr. 650, 651, fol. ed. S. C. 13 Howell's St. Tr. 114.
(2) Smith's case, Fost. 242.
(3) L'Neve v. L'Neve, 1 Ves. 64, 66. 3 Atk. 646, S. C. 1 Ves. 97, 125. 2 Ves. jun. 243. East India Comp. v. Donald, 9 Ves. 282, 283.
(4) Walton v. Hobbs, 2 Atk. 19. Janson v. Rany, ib. 140. Pember v. Mathers, 1 Bro. Ch. Ca. 52. Toole v. Medlicott, 1 Ball & Beattie, 403. Biddulph v. St. John, 2 Scho. & Lef. 521.

(o) See Note 292, p. 284.

(abstracting from the mind, that the evidence on the part of the plaintiff comes from a disinterested witness,) (1) the former rule will not apply; and the evidence of a single witness, so strengthened and confirmed, will enable the court to decree against the answer. (*p*) And there are many cases in which the court has granted a decree against the defendant on the testimony of a single witness, when his testimony has not been clearly and positively contradicted by the answer. (2) (*q*)

Rule in ecclesiastical courts.

By the civil law, as was before observed, two witnesses are required for the proof of a fact; and such is the rule in ecclesiastical courts, whose practice is founded upon that law. But even in those courts, if a matter cognizable at common law arises incidentally in an ecclesiastical suit, (as, where a revocation of a will is pleaded, or payment of a legacy, or plene administravit, and the like,) the proof ought to be according to the principles and course of the common law; and if they disallow the plea, because it is proved only by a single witness, they may be controlled by a prohibition. (3)

Sect. II.

Of the Nature of Presumptive Evidence.

Presumptive proof.

Evidence consits either of positive or of presumptive proof. (*r*) The proof is positive, when a witness speaks directly to a fact from his own immediate knowledge; and presumptive, when the fact itself is not proved by direct testimony, but is to be inferred from circumstances, which either necessarily or usually attend such facts. (4) This latter is also called circumstantial evidence. It is obvious, that a presumption is more or less likely to be true, according as it is more or less probable, that the circumstances would not have existed, unless the fact, which is inferred from them, had also existed: and that a presumption can only be relied on, until the contrary is actually proved. (*s*)

In order to raise a presumption, it cannot be necessary to con-

(1) 9 Ves. 283.
(2) 3 Atk. 650. 1 Ves. 66, 97. 12 Ves. 80. 3 Ves. & Beam. 59.
(3) Sir W. Juxon v. Lord Byron, 2 Lev. 64. Richardson v. Disborow, 1 Ventr. 291. Shotter v. Friend, Carth. 142. 1 Ld. Ray. 221. Cowp. 424. Comyn's Dig. tit. Prohibition, (F. 13,) and (G. 23.)
(4) Gilb. Ev. 142.

(*p*) See Note 293, p. 287. (*q*) See Note 294, p. 287. (*r*) See Note 295, p. 288. (*s*) See Note 296, p. 288.

fine the evidence to such circumstances alone, as could not have happened, unless they had been also attended by the alleged fact—for that in effect would be to require in all cases evidence amounting to positive proof;—but it will be sufficient to prove those circumstances, which usually attend the fact. (*t*) The definition of the civilians is most correct, "presumptio nihil aliud est, quam argumentum verisimile, communi sensu perceptum, ex eo quod plerumque fit aut fieri intelligitur." A presumption is a probable inference, which our common sense draws from circumstances usually occurring in such cases. (*u*) The slightest presumption is of the nature of probability; and there are almost infinite shades from the lightest probability to the highest moral certainty. (*v*) If the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, it is to be received and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. (1) (*w*) However, for the purpose of trying the weight and effect of such presumptive proofs, it will often be of the utmost consequence to consider, whether any other fact happened, which might have been attended by the same circumstances, and with which of the facts they are most consistent. (*x*)

"A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof, that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and in case of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion

(1) 2 H. Black. 297.

(*t*) See Note 297, p. 289. (*u*) See Note 298, p. 289. (*v*) See Note 299, p. 307. (*w*) See Note 300, p. 308. (*x*) See Note 301, p. 309.

from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, human reason cannot do otherwise than adopt the conclusion to which the proof tends." (1)

It has been very justly observed, (2) that when the proofs are dependent on each other, or when all the proofs are dependent upon one, the number of proofs neither increase nor diminish the probability of the fact: for the force of the whole is not greater than the force of that on which they depend; and if this fails, they all fall to the ground. (*y*) But when the proofs are distinct and independent of each other, the probability of the fact increases in proportion to the number of the proofs: for the falsehood of one does not diminish the veracity of another. (*z*)

Presumption of law.

There are presumptions of law, as well as presumptions of fact. Some presumptions of law are considered so strong and conclusive, as not to admit of contrary proof; but there are few instances of this, and much fewer in the present day than formerly, the doctrine of conclusive presumptions applying principally, if not exclusively, to estoppels. That innocence is to be presumed, till the contrary is proved, may be called a presumption of law, founded on the universal principles of justice. That a child born during marriage shall be presumed to be legitimate, is another presumption of the same description. The grants and deeds are to be presumed in support of long undisturbed possession, is also a presumption of

(1) By Lord Tenterden, in R. v. Sir F. Burdett, 4 Barn. & Ald. 161.

(2) Beccaria ch. xiv. The reader will find many sensible observations, on the subject of Presumption and Presumptive evidence, in Evans' Appendix to his edition of Pothier on Contracts, Numb. 16, sect. 14; and in a chapter in Burnett's Treatise on the Criminal Law of Scotland. There are also some sensible remarks in a small tract, entitled "The Theory of Presumptive Proof."

(*y*) See Note 302, p. 313. (*z*) See Note 303, p. 313.

law, founded on principles of public policy and convenience. Something will be said, in the course of this section, on each of these presumptions.

Presumption of legitimacy.

Children, born during a lawful marriage, are presumed to be legitimate; but this presumption may be removed by competent proof of their illegitimacy. Formerly the rule was so strict in favor of legitimacy, that any proof of the contrary would not be admitted, unless the husband had been out of the kingdom during the whole time of gestation; (*a*) but this doctrine has been long exploded. The general principle, to be deduced from the authorities on this subject, as it was laid down and confirmed by the case of The King v. Luffe, (1) appears to be this—that where there are circumstance, which show an impossibility that the husband could be the father, whether arising from his being under the age of puberty, or from his laboring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, or from his continued absence, the presumption is at an end, and the child will be deemed illegitimate.

Rebutted by proof of non-access.

Proof of non-access.

In an earlier case, (2) the court of king's bench held, that there was no necessity to prove the impossibility, if the other circumstances of the case tended strongly to repel the presumption of access. And this point has been since established by the opinion of the judges in the case of the Banbury claim of peerage, (3) in which it was held, that where the husband and wife are not proved to be impotent, and have had opportunity of access to each other during the period, in which a child could be begotten and born in the course of nature, the presumption of legitimacy, arising from the birth of the child during wedlock, may be rebutted by circumstances inducing a contrary presumption: and the fact of non-access (that is, the non-existence of sexual intercourse,) as well as the fact of impotency, may always be lawfully proved by means of such legal evidence, as is strictly admissible in every other case, where a physical fact is to be proved.

(1) 1 East, 193, 206.
(2) Goodright, dem. Thomson, v. Saul, 4 T. R. 356.
(3) 2 Selw. N. P. 731, S. P. reported in Simon's & Stuart's Rep. vol. i. 153. And see Head v. Head, 1 Turner's Ch. R. 140. 1 Sim. & Stuart's Rep. 150, S. C.

(*a*) See Note 304, p. 314.

This case of the Banbury peerage was much cited in the Court of Chancery, in the case of Head v. Head.(1) The Lord Chancellor is there reported to have said, that, "according to his recollection of that case, it was the opinion of the judges, that where personal access is established, sexual intercourse is to be presumed, and that that presumption must stand, until removed by clear and satisfactory evidence;—whether that evidence apply directly to the period, at which personal access has been proved, or whether it may be called satisfactory, if it apply not to that period, but to antecedent and subsequent periods." (2) (*b*)

Birth during divorce.

It has been held, that, in case of a divorce *a mensa et thoro*, a child born after such a separation is presumed to be illegitimate:(3) in this case, therefore, the party, who asserts the child's legitimacy, will have to prove access.

Pr. ev. of payment.

A receipt for rent due on a certain day is strong presumptive evidence, that the former rents have been regularly paid down to that time. (*c*) But it is only presumptive evidence; and the other party will be allowed to prove the contrary. (4) "If a man give a receipt for the last rent," says Ch. B. Gilbert, (5) "the former is presumed to be paid, because he is supposed first to receive and take in the debts of the longest standing; especially, if the receipt be in full of all demands, then it is plain there were no debts standing out; and if this be under hand and seal, the presumption is so strong, that the law admits of no proof to the contrary." In an action for work and labor done for the defendant, proof that the plaintiff and other workmen, who were employed by the defendant, came regularly to receive their wages from the defendant, whose practice was to pay every week, and that the plaintiff had not been heard to complain of non-payment, would be presumptive evidence of payment, to meet a stale demand. (6)

Receipt.

(1) 1 Turner, Ch. R. 141.

(2) See also Selw. N. P. 731, 732.

(3) Parish of St. George v. St. Margaret, 1 Salk. 123.

(4) Vide supra, p. 108.

(5) Gilb. Ev. 142. In Ahner v. George, 1 Camp. 392, the plaintiff's receipt, "in full of all demands," was held to be a bar to his action of assumpsit for goods sold. See Dalzell v. Mair, 1 Campb. 532; De Gaminde v. Pigou, 4 Taunt. 246, which two last cases show, that an admission of the receipt of the premium, in a policy of insurance, is conclusive evidence of the payment, as between the assured and the underwriter. See also Baker v. Dewey, 1 Barn. & Cress. 704.

(6) Lucas v. Novosilienski, 1 Esp. N. P. C. 296. See vol. ii. plea of *sovit ad diem*, in action of debt, p. 171, et seq.

(*b*) See Note 304, p. 314. (*c*) See Note 306, p. 314.

Pr. ev. of release of quit-rent.

It may be presumed that a bond has been satisfied after a forbearance for 20 years, unexplained on the part of the obligee.(1)(*d*) But it has been held, in the case of a quit-rent claimed by the lord of a manor, that proof by the tenant, that no demand had been made upon him for near 40 years, was not a sufficient ground for presuming a release or extinguishment; and that no such presumption could be raised within less than 50 years, which is the period fixed by the statute of limitations.(2) A bond may be discharged by payment, and, on account of the difficulty of proving this fact after a length of time, it is reasonable to presume it without positive proof: but for the extinguishment of a quit-rent a deed is necessary, and it would be too much to presume, that the lord of a manor has executed such a deed, from the mere fact of his not having demanded payment of the quit-rent. "A presumption," said Mr. Justice Aston, "from mere length of time, which is to support a right, is very different from a presumption to defeat a right; here the presumption is to defeat the right of the lord to a small payment within the 50 years limited by the statute; and, therefore, upon mere length of time, unaccompanied by other circumstances, such a limitation ought not to be altered, and another set up."(*e*)

Bond.

Pr. ev. of. property.

Possession is *prima facie* evidence of property. Possession with an assertion of property, or even possession alone, gives the possessor such a property as will enable him to maintain an action of trover or trespass against a wrong-doer. (3)(*f*) Thus it has been held, that an agister of cattle may maintain trespass against a person for wrongfully taking them away. (4) And this principle applies to criminal as well as civil cases. On a prosecution for larceny, therefore, the property of the goods may be laid in the person who had possession at the time; and proof of the mere possession will support the indictment. This has been determined in the case of an agister of cattle, (5) and in the case of a coachman who drove a stage-coach by which the goods

Possession.

(1) See vol. 2. c. 7, on action of debt, and plea of *non est factum*.
(2) St. 32 H. 8, c. 2, s 4. Eldridge v. Knott, Cowp. 214.
(3) Armorie v. Delamirie, 1 Str. 505. Graham v. Peate, 1 East, 244. Sutton v. Buck, 2 Taunt. 302.
(4) 2 Roll. Abr. tit. Trespass, (M.)
(5) Woodward's case, 2 East, P. C. 653.

(*d*) See Note 307, p. 316. (*e*) See Note 308, p. 352. (*f*) See Note 309, p. 353.

were sent. (1) So (to give another example in a civil case,) in an action on a policy of insurance, (2) the mere fact of possession of a ship by the plaintiff, as owner, is sufficient *prima facie* evidence of ownership; and though it should appear on the cross-examination of one of the witnesses of the plaintiff, that the plaintiff derived his ownership under a bill of sale executed by the witness himself, it would not on that account become necessary for the plaintiff to produce that bill of sale. The proof of possession will be sufficient without the aid of any documentary proof, unless such ulterior evidence should be rendered necessary in consequence of some contrary proof on the other side.

Presumption of grant.

Possession of ship.

There are many cases, not within the statute of limitations, in which courts of justice have held, that juries ought to presume the most solemn instruments to support a long uninterrupted possession. All shall be presumed to have been solemnly done, rather than ancient grants, which were necessary for the perfection of the thing, should be called in question, although the grants cannot now be shown. (3) Ancient possession would injure, instead of strengthening a title, if, after a succession of ages and the decease of parties, objections should prevail, which might have been answered in the lifetime of the parties, and which, if well founded, would most probably have been sooner made. (4) Charters and grants from the crown may be presumed from great length of possession, not only in suits between private parties, but in some cases against the crown itself, if the crown were capable of making the grant. Thus, before the st. 9 G. 3, c. 16, Lord Mansfield, C. J., held that a possession and enjoyment for a hundred years were evidence in support of a title against the crown; for though such possession could not conclude as a positive bar, because there was no statute of limitation against the crown, yet it might operate against the crown as evidence of right in the defendant, if the claim could have a legal commencement. (5) (*g*)

Pr. ev. of grants.

Charters.

(1) Deakin's case, 2 East, P. C. 653.

(2) Robertson v. French, 4 East, 130.

(3) 8 East, 263. Bedle v. Beard, 12 Rep. 5. Mayor of Kingston v. Horner, Cowp. 102. 3 T. R. 151, 158. 7 T. R. 492. Goodtitle dem. Parker v. Baldwin, 11 East, 488.

(4) Ibid.

(5) Case of the King against Brown, cited by Lord Mansfield, Cowp. 110. And see cases in note (3), supra.

(*g*) See Note 310, p. 354.

Presumption of grant.

Grants are presumed, where the original possession or enjoyment cannot otherwise be legally accounted for, or satisfactorily explained. (1) "It is *in respect of the ancient continual possession*, (says Sir Edward Coke, (2) in the case before referred to,) that a lawful grant shall be intended." Again, he says, "all shall be presumed to be done, *which shall make the ancient appropriation good.*" He adds, "ancient grants and acts are not to be drawn in question, although they cannot be shown, *which at first were necessary to the perfection of the thing.*" But where the original possession is satisfactorily accounted for and explained without the aid of a grant or conveyance, and is consistent with the fact of there having been no conveyance, it is then a question, to be determined by the jury, whether in fact, any grant or conveyance was ever made. The case of Doe, on the demise of Fenwick v. Reed, (3) lately decided, affords an example. The defendants, in that case, claimed under a person, who was put into the possession of the estates in 1752, in satisfaction of a debt owing to him from E. C., the owner of the property, under whom the lessor of the plaintiff claimed; and that person's family had retained possession from that time. It was proved, also, that the title deeds, relating to the estates, still continued in E. C.'s family, and that moduses had been paid in 1779 for several estates, including the estate in question. The Court of King's Bench determined, that the question had been properly left to the jury, to consider, whether they believed, that, in fact, any conveyance of the property had ever been made to the person under whom the defendants claimed. The verdict was for the lessor of the plaintiff; and the court refused to grant a new trial. (*h*)

Presumption when necessary.

Endowment.

An endowment of a vicarage may be presumed from the long and continued possession of tithes and other profits. (4) (*i*) So, long and uninterrupted usage will support a *modus decimandi*. Such usage is evidence from which the jury may presume an agreement beyond time of memory, between the land-owners and all the parties, whose consent was necessary to give it effect. But usage will not of itself be sufficient to support a *modus de*

Modus.

(1) 5 Barn. & Ald 236, 237.
(2) 12 Rep. 5, b.
(3) 5 Barn. & Ald. 232.
(4) Crimes v. Smyth, 12 Rep. 4. 2 Gwill. 514, 716, 732.

(*h*) See Note 311, p. 353. (*i*) See Note 312, p. 371.

non decimando, claimed by a lay person against a spiritual rector; although it is certainly strong evidence of the right, when a legal foundation for such an exemption has been established. And though constant usage is evidence of a *modus decimandi*, and is a ground for presuming grants even against the crown ; yet in the particular instance of a composition real in lieu of tithes, it is settled, that where the deed cannot be produced, some evidence must be given referring to the deed, or showing that it did exist, independent of mere usage. (1) (*j*) And the reason, why this has been so held, is stated to be, that, if it were otherwise, the church would be defrauded, and every bad *modus* turned into a good composition. "The presumption of a deed from long usage is for the furtherance of justice and for the sake of peace, when there has been a long exercise of an adverse right. For instance, it cannot be supposed, that any man would suffer his neighbor to obstruct the light of his windows (*k*) and render his house uncomfortable, or to use a way with carts and carriages over his meadow for 20 years successively, unless some agreement had been made between the parties to that effect, of which the usage is evidence. But with respect to a composition for tithes, the same reason does not obtain, because temporary agreements are made and continued for the convenience of parties during a succession of incumbents : and there is no exercise of any adverse right, which is generally deemed necessary to raise the presumption." (2) (*m*)

Presumption of grant.

Composition real.

Lights.

Way.

Upon the same principle, uninterrupted enjoyment of an easement (*n*) for twenty years or upwards is strong evidence of a right of enjoyment, from which juries are directed by the court to presume a conveyance or agreement ; as, in an action on the case for obstructing the plaintiff's lights (3) or in the case of a market regularly kept above twenty years. (4) (*o*) A faculty from the ordinary may be presumed from the long uninterrupted use of a pew

Easement.

Faculty.

(1) Knight v. Halsey, in error, 2 Bos. & Pull. 206. Bennet v. Neale. 1 Wightw. 324. Chatfield v. Fryer, 1 Price, 253. Ward v. Shepherd, 3 Price, 608. Bennett v. Skeffington, 1 Daniel's Rep. 10. And see 1 Eden's Rep. 296.

(2) 2 Bos. & Pull. 206.

(3) Lewis v. Price, reported in Mr. Serjt. Williams' ed. of Saund. 2 vol. 175, *a* ; Dongal v. Wilson, ib. 175, *b* ; Darwin v. Upton, ib. 3 T. R. 159. Cross v. Lewis, 2 Barn. & Cres. 686. Moore v. Rawson, 3 Barn. & Cres. 332.

(4) Holcroft v. Heel, 1 Bos. & Pul. 401.

(*j*) See Note 313, p. 371. (*k*) See Note 314, p. 371. (*l*) See Note 315, p. 373. (*m*) See Note 316, p. 375. (*n*) See Note 317, p. 375. (*o*) See Note 318, p. 385.

Presumption of grant.

in a church, claimed as appurtenant to a messuage. (1) (*p*) An adverse enjoyment of a way over another person's land for above 20 years has been considered a strong ground for the jury to presume a grant, although, about 26 years before, the way had been extinguished by an award under an inclosure act. (2) If, indeed, the party had asserted his right to be grounded on the award, this would show that the way was used by mistake; but unless it could be clearly referred to something else besides adverse possession, the jury would probably be directed not to consider small circumstances as raising a presumption, that the possession arose otherwise than by grant.

Way.

Licence.

Adverse possession for a shorter period than 20 years will not of itself afford a ground for such a presumption; and there ought to be some other evidence in support of the right. (3) However, a licence may be presumed within that time, though in general a grant cannot; as, in an action of ejectment to recover part of a waste enclosed by the defendant, where it was proved that the steward of the lord of the manor had from time to time seen the inclosure, which had been nearly thirteen years, without making any objection, this was held to be evidence from which the jury might presume a licence from the lord. (4)

Usage

In the cases which have been mentioned, the usage for twenty years was considered to be strong presumptive evidence of a grant or agreement. The original enjoyment cannot be legally explained or accounted for, unless a grant has been made; and on this ground it is, that such grants are presumed. (5)

explained.

But usage is only *presumptive* proof; and, therefore, evidence is admissible to repel such a presumption; as, by showing that the usage was limited, or modified, or bad in its commencement, or that it clearly originated in a mistake. (6) In the case of

(1) Rogers v. Brooks, 1 T. R. 431, (*a.*) Griffith v. Matthews, 5 T. R. 296, 298.

(2) Campbell v. Wilson, 3 East, 294, 302. Keymer v. Summers, Bull. N. P. 74. Carr v. Heaton, 3 Gwill. 1262. As to a public right of way, by a presumed dereliction on the part of the owner of the soil, see the case of the Trustees of the Rugby Charity v. Merryweather, 11 East, 375. n. R. v. Lloyd, 1 Campb. 260. R. v. Barr, 4 Campb. 16. Woodyer v. Haddon, 5 Taunt. 125. Harper v. Charlesworth, 4 Barn. & Cres. 574.

(3) 6 East, 215. 4 Burr. 1963. Cotterel v. Griffiths, 4 Esp. N. P. C. 69.

(4) Doe, dem. Foley, v. Wilson, 11 East, 56.

(5) 5 Barn. & Ald. 237.

(6) 3 East, 300, 302. Dawson v. D. of Norfolk, 1 Price, 246.

(*p*) See Note 319, p. 385.

Darwin v. Upton, (1) which has been cited, where the effect of this kind of evidence was much considered, Lord Mansfield said, "The enjoyment of lights with the defendant's acquiescence for twenty years is such decisive presumption of a right by grant or otherwise, that, unless contradicted or explained, the jury ought to believe it. But it is impossible that length of time can be said to be an *absolute bar*, like a statute of limitation; it is certainly a *presumptive bar*, which ought to go to the jury." The other judges also were strongly of the same opinion. Presumption of grant. Only presumptive proof.

The usage which is supposed to be founded on a grant or agreement determines also the extent of the supposed grant. (2) The right granted is considered to be commensurate with the right enjoyed. A person who has enjoyed a limited right cannot lawfully enlarge it to the detriment of others; and in case of such enlargement, those who are prejudiced may lawfully obstruct the use in the newly acquired part; but still he will be entitled to the enjoyment of his former right, not only to the same extent, but in the same specific manner. (3) So, if a person has a way for carriages from D. to B. over another man's close, and purchases land adjoining to B., he cannot use the way with carriages to the adjoining land, though he come first to B., and so to the adjoining land; for this way may be prejudicial to the other person's close. (4) The continued use and enjoyment of a private way for carriages does not necessarily imply a right to use it as a drift-way, though the one has been often understood as including the other. (5) However, it has been held that the use of a carriage-way is evidence of a right of way for all kinds of cattle, more especially, if some species of cattle have been usually driven along the way; and that it will be a question for the jury to determine, from the nature and situation of the premises, and from other circumstances, whether it is more probable that the grant included both rights of way, or that one of them was excluded. (6) Limited right. Way.

(1) 2 Saund. 175, c. See also 6 East, 208, 214.
(2) 14 East, 339, 340.
(3) Chandler v. Thompson, 3 Campb. 80. And see Martin v. Goble, 1 Campb. 320. Bealey v. Shaw, 6 East, 208.
(4) Roll. Ab. 391, tit. Chimin, art. 3. Laughton v. Ward, 1 Lutw. 111.
(5) 1 Taunt. 284, 285.
(6) By Mansfield C. J. and Chambre J. in Ballard v. Dyson, 1 Taunt. 279.

Presumption of grant.

Consent of owner.

Way.

The principle above stated must always be understood with this qualification, that the possession, from which the party would presume a grant of the easement, was with the knowledge of the person seised of an estate of inheritance (*q*) If a tenant for years or for life gives a licence to another to enjoy an easement on his lands for above twenty years without interruption, this will not effect the person in reversion or remainder; but, on the determination of the particular estate, he may dispute the right to the easement, and the length of possession will not be evidence against him to presume a grant, unless it can be shown that he acquiesced. (1)

Lights.

So, where a person made windows in his house, and had them for above twenty years, without any interruption from the occupier of the opposite premises, who occupied them under a lease, the Court of King's Bench held, that the possession of such an easement would not affect the landlord on the determination of the lease, and that he would not be liable to an action for raising the height of his own premises, and thereby obstructing the light through the new windows. (2)

Pr. ev. in criminal cases.

Presumptive, or circumstantial evidence, must obviously be as admissible in criminal prosecutions as in civil cases; for whether the proceeding be of a civil or criminal nature, the modes of reasoning, and of drawing conclusions from facts, must necessarily be the same. (*r*) When direct evidence of facts cannot be supplied, as must continually happen in some of the worst species of crimes, reasonable minds will necessarily form their judgment on circumstances, and act on the probabilities of a case. The whole system of human action proceeds on probability. And "as mathematical or absolute certainty" (to use the words of Lord Mansfield in the Douglas cause) (3) "is seldom to be attained in human affairs, reason and public utility require, that judges, and all mankind, in forming their opinion of the truth of facts, should be regulated by the superior number of the probabilities on the one side or the other, whether the amount of these probabilities be expressed in words and arguments, or by figures and numbers." The principal difference to be remarked between civil and criminal cases,

(1) Bradbury v. Grinsel, 2 Saund. 175, *d.* in note. Wood v. Veal, 5 Barn & Ald. 454. Harper v. Charlesworth, 4 Barn. & Cress. 574.

(2) Daniel v. North, 11 East, 372.

(3) Cited in Andrew Stuart's 3d. letter to Lord Mansfield, vide supra, p. 157.

(*q*) See Note 320, p. 385. (*r*) See Note 321, p. 385.

with reference to the modes of proof by direct or circumstantial evidence, is, that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter case, which affects life and liberty. In criminal prosecutions, it has been observed, (1) the circumstantial evidence should be such, as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. Doubtless, the circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of his guilt.

Circumstantial evidence has, in some instances, undoubtedly been found to produce a much stronger assurance of the prisoner's guilt, than could have been produced by the most direct and positive testimony. (2) As a general principle, however, it is certainly true, that positive evidence of a fact from credible eye witnesses is the most satisfactory that can be produced, and the universal feeling of mankind leans to this species of evidence in preference to that which is merely circumstantial. If positive evidence of a fact can be produced, circumstantial evidence ought not to be trusted. (*s*) Chief Baron Gilbert, therefore, considers it a higher species of proof. He says, "When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances which necessarily or usually attend such facts; and which are called presumptions and not proofs, for they stand instead of the proofs of the fact, till the contrary be proved." (*t*)

Difference between witnesses.

A difference between witnesses on points of little importance affords no reason to suspect their veracity. These variations in testimony occur every day in the transactions of common life, and may be explained on the commonest principles of human nature,

(1) Burnet's Treatise on the Criminal Law of Scotland, p. 323. See also the very masterly summing up of the Lord Ch. Justice of the Court of K. B. in Ireland, on the trial of Graham, Forbes, and others for a conspiracy. Printed Rep. p. 350.

(2) A very remarkable case of circumstantial evidence is stated at length in Burnet's Treat. on the Criminal Law of Scotland, p. 524.

(*s*) See Note 322, p. 385. (*t*) See Note 323, p. 386.

Men relate facts as they observe and remember them; and the powers of attention, observation, and memory, are infinitely diversified. A difference in the manner of relating unimportant circumstances is perfectly natural, and what might be expected in the ordinary course of things: on the contrary, it is the exact coincidence in minute particulars, that shows contrivance, and excites suspicion. An eminent writer, in adverting to the differences in the narrative of the sacred writers, has made some very judicious observations on this subject, which are of universal application. (1) "If several independent witnesses of fair character," he says, "should agree in all the parts of a story, (in testifying, for instance, that a murder or a robbery was committed at a particular time in a particular place, and by a certain individual,) every court of justice in the world would admit the fact, notwithstanding the abstract possibility of the whole being false. Again, if several honest men should agree in saying that they saw the King of France beheaded, though they should disagree as to the figure of the guillotine, or the size of his executioner, as to the King's hands being bound or loose, as to his being composed or agitated in ascending the scaffold; yet every court of justice in the world would think, that such difference, respecting the circumstances of the fact, did not invalidate the evidence respecting the fact itself. It would be impossible to establish the truth of any fact, if a disagreement in the evidence of witnesses, in minute points, should be considered as annihilating the weight of their evidence in points of importance. In a word, the relation of a fact differs essentially from the demonstration of a theorem. If one step is left out, if one link in the chain of ideas constituting a demonstration is omitted, the conclusion will be destroyed; but a fact may be established, notwithstanding a disagreement of the witnesses respecting it in certain trifling particulars of their evidence." (*u*)

Goods found on prisoner.

On an indictment for larceny, proof that part of the stolen goods have been found upon the person of the prisoner, or in his house or possession, is presumptive evidence against him of his having stolen them, so as to call upon him for his defence; and may be sufficient to warrant a conviction, if no facts appear

(1) The Bishop of Llandaff's Apology, p. 79.

(*u*) See Note 324, p. 395.

in evidence to repel that presumption. The goods are sometimes found in the prisoner's house before his apprehension, frequently found afterwards; and there can be no objection to proof of their being found at one time or the other. This kind of evidence is frequently strengthened materially by other circumstances, as by proof, that about the time of the offence, the prisoner was near the spot from which the goods were taken, or that he gave some false account respecting the goods on being charged with the crime, or endeavored to conceal them, or, perhaps, tried to prevent an inspection, or by some other proof of suspicious circumstances in his behaviour. On the other hand, the inference, arising from the mere fact of possession, will be much weakened, if any considerable time has elapsed between the loss of the property and the finding of it again, or if the property was from its nature likely to pass in the interval through many hands; especially, where the prisoner betrayed no appearance of guilt at the time of his apprehension. (*t*)

Sect. III.

Evidence is to be confined to the Points in Issue. (*u*)

The sole object and end of evidence is, to ascertain the truth of the several disputed facts or points in issue on the one side or on the other; and no evidence ought to be admitted to any other point. As it is a rule of pleading, that the issue should be on a material point, so it is an essential rule of evidence, that the proof should be material and relevant to the issue. (*v*)

Relevancy.

Evidence must always be considered with reference to the subject matter, to which it is applied. And it is material, therefore, to consider the view, with which particular evidence is offered, in order to determine whether it bears upon the point in issue. Evidence may be admissible in one point of view, though not in another. (*w*) A question, for instance, which would have been irrelevant and improper on the examination in chief, may be rendered necessary by the course of a cross-examination.

Larceny.

In criminal cases, though it is not material, in general, to inquire into any other stealing of goods, besides that specified in

(*t*) See Note 325, p. 423. (*u*) See Note 326, p. 428. (*v*) See Note 327, p. 429. (*w*) See Note 328, p. 430.

the indictment, yet, for the purpose of ascertaining the identity of the person, it may be often important to show, that other goods, which had been upon an adjoining part of the premises, were stolen in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and in that point of view it is material. (*x*) Thus also, on an indictment for the crime of arson, it may be shown, that property, which had been taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner. (1) To give one other instance: On an indictment against a county, for not repairing a public bridge, the defendants may show, under the general issue, that the bridge had been repaired from time to time by private individuals; for one question is, whether the bridge is a public bridge? and upon that question it is material to inquire, by whom and in what manner it had been repaired, with a view of ascertaining, whether those repairs were adapted to the service of the public, or merely to the purposes of ornament or private convenience. It is one medium of proof, to show that the bridge has been repaired by individuals; though that alone would be of very little weight. (2) (*y*)

Arson.

Public bridge.

Admissions on record.

As the jury are bound to try only the matter in issue between the parties, no evidence need be given to prove any points which are admitted on the record, and none can be received to dispute an admission on the record. (3) Thus in an action for cutting down trees, if the plaintiff replies to the defendant's plea of soil and freehold, that the trees were his trees and freehold, &c. he thereby admits the plea of the defendant, and cannot dispute that he had the freehold of the soil. So, if a tenant justifies for common, and the issue on the right of common is found for the demandant, the jury cannot find, that the tenant did not put in his cattle; for that is admitted. (4) So in an action of debt on an award, where the defendant pleads *no such award*, the jury cannot find matters which make the award void, if they are not contained in the award itself. (5) If the defendant, in an action

Trespass.

Case.

Debt.

(1) Rickman's case, 2 East, P. C. 1035.
(2) R. v. The Inhabitants of Northamptonshire, 2 Maule & Selw. 262.
(3) Bull. N. P. [298.]
(4) Com. Dig. tit. Pleader, (S. 17.)
(5) 2 Roll. Abr. 692, l. 25.

(*x*) See Note 329, p. 432. (*y*) See Note 330, p 432.

Covenant.

of covenant for not keeping premises in repair, plead performance, he admits, by refraining from the plea of *non est factum*, so much of the deed as is expanded on the record ; but he admits no more; and if the plaintiff would avail himself of any other part of the deed, he must prove it in the common way by the attesting witness. (1)

Plea of *plene admin.*

The defendant's plea of *plene administravit* admits that he is administrator, and he cannot afterwards dispute it in the same action. The plea of *not guilty* in an action for an assault upon a person described as the wife of the plaintiff, admits the marriage. The plea of *payment*, in an action of debt by the assignees of a bankrupt upon a bond, admits their title to sue as assignees ; (2) the general principle being, that a party, who puts himself upon one issue, admits all the rest. If the defendant in an action of trespass justify the removing of the object, with which he is charged, as injurious to his property, and the plaintiff reply that the defendant removed it with unnecessary force, doing unnecessary damage, &c., this replication admits damage to a certain extent, such as would justify the defendant in removing the object, and, therefore, precludes the plaintiff from showing that no damage had been done. (3) (*z*)

Payment.

Justification in trespass.

Proof of other transactions

Such evidence alone ought to be admitted, as in some manner bears upon the question at issue. An inquiry into other transactions, besides those immediately contested, may in some cases be entirely irrelevant. The relevancy of evidence must depend upon the nature and circumstances of the particular case; for all evidence is to be considered with reference to the subject matter, to which it is applied. For instance, in an action against an acceptor of a bill of exchange, if the defence is that the acceptance is forged, it cannot be material to inquire, whether the person, suspected of the forgery, has forged the defendant's name to another acceptance. (4) Or where the question, between a

Other acceptance.

(1) Williams v. Sills, 2 Campb. 419. For other examples see Hill v. Wright, 2 Esp. N. P. C. 669. Watson v. King, 4 Campb. 272. Harrington v. M'Morris, 5 Taunt. 228.

(2) Crosbie v. Oliver, 1 Stark. N. P. C. 76.

(3) Pickering v. Rudd, 1 Stark. N. P. C. 58.

(4) Balutti v. Serani, Peake, N. P. C. 142. Viney v. Barrs, 1 Esp. N. P. C. 293.

(*z*) See Note 331, p. 444.

Other agreement.

landlord and his tenant, is, whether rent was payable quarterly or half-yearly ? it must be obviously irrelevant to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due. (1) (*a*)

On the other hand, it may frequently be very proper, and in some cases absolutely necessary, to look beyond the transaction, which is the immediate subject of inquiry, into previous transactions, for the purpose of discovering the knowledge of the parties, their motives, or intentions. (2) The case of Hunter v. Gibson and Johnston (3) affords an instance of this kind. That was an action by an indorsee against the defendants, as acceptors of an instrument purporting to be a bill of exchange: a question arose on the third count, which stated the bill to be payable to bearer, under the following circumstances: It appeared in evidence, that the name of the person mentioned as payee was merely fictitious, but this fact was not known to the plaintiff; and for the purpose of showing, that the defendants at the time of their acceptance *knew* the name in the bill to be fictitious, or that the defendants had *given authority* to the drawer to draw the bill in question payable to a fictitious person, the plaintiff proposed to prove, that the defendants had given a general authority to the drawer to draw bills of exchange upon them, to be made payable to fictitious persons, and evidence to this effect was produced; the counsel for the defendants objected to this evidence, on the ground that it had no relation to the particular bill in question, and the facts of any particular transaction could not legally be inferred from circumstances which applied wholly to other transactions. Lord Kenyon, who tried the cause, admitted the evidence; upon which, the counsel for the defendants tendered a bill of exceptions. The Court of King's Bench gave judgment for the defendant in error. A writ of error was then brought in the House of Lords; and the question on the admissibility of the evidence was referred to the Judges. On this question there was a division among the Judges: but the majority of them being of opinion, that the

Other transactions to show *knowledge.*

(1) Carter v. Pryke, Peake, N. P. C. 94. For other examples, see Holcombe v. Hewson, 2 Campb. 391. Spencely v. De Willot, 7 East, 108.

(2) See infra, as to the *proof of knowledge* in issuing counterfeit money.

(3) 2 H. Bl. 187, 288, 290, 295.

(*a*) See Note 332, p. 451.

evidence ought to have been received and left to the jury, the judgment below was affirmed. (*b*)

Proof of other customs.

When a right is claimed by custom in a particular manor or parish, proof of a similar custom in an adjoining parish or manor is not admissible in evidence.(1) In the Duke of Somerset's case,(*c*) Lord Ch. J. Raymond said, he had always looked upon it as a settled principle in the law, that the customs of one manor should not be given in evidence to explain the custom of another manor; "for, if this kind of evidence were to be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same." And, in addition to this argument of inconvenience, the objection taken to the evidence in that case, namely, that it was inapplicable to the point in dispute, appears to be very strong; customs being different in different manors, and in their nature distinct. Unless, therefore, some connection or relation is proved to have existed between them, as by showing that they were all formerly holden under the same lord, or that the one manor was anciently parcel of the other manor, (2) such evidence is not admissible.

Proof of customs in other manors, &c.

But several cases appear to have determined this point, that, where all the manors within a certain district are held by the same peculiar tenure, and a question arises in any one of them upon an incident to the tenure, evidence may be given of the usage, which prevails in any of the other manors within the district. The first reported case of this kind is Champian v. Atkinson, (3) where the question was, whether a general fine was due to an infant preceding lord during his minority? and the defendants were allowed to give in evidence upon the trial of this issue, that other adjoining manors had the same custom, not to pay to the lord before he attained his full age; and similar evidence was there said to have been received, on a question of copyhold tenure, between certain manors in Middlesex.

Rule in questions of *tenure*.

(1) Duke of Somerset v. France, 1 Str. 661. Ruding v. Newell, 2 Str. 957. Furneaux v. Hutchins, Cowp. 807. By Buller, J. in Noble v. Kennoway, 2 Douglas, 512, S. P.; by Wood, B. in Doe dem. Foster v. Sisson, 12 East, 63, S. P. Erskine v. Ruffle, 3 Gwill. 965.

(2) Moulin v. Dalison, Cro. Car. 484.

(3) 3 Keb. 90, on Tr. at bar.

(*b*) See Note 333, p. 452. (*c*) See Note 334, p. 455.

Proof of other customs.

On the authority of this case of Champian v. Atkinson, the Duke of Somerset's case (1)(*d*) was principally decided. On a trial at bar in that case, where the issue was, whether a general fine was due from the tenants of certain manors in Cumberland to the Duke as next admitting lord, the court, after much argument, received evidence, that the same fines had been paid in similar cases to the lords of other manors. Lord Ch. J. Raymond and Reynolds, J. laid down the general rule as above stated, and were strongly against admitting the evidence; but afterwards agreed to receive it, on the authority of the precedent in Keble, and of cases said to have been so ruled on the northern circuit. Fortescue, J., the only other judge present, thought the evidence admissible, and made a distinction between the *custom* and the *tenure* of a manor; and as the question, there to be tried, merely concerned the tenure of the plaintiff's manors, he was of opinion that it would be proper to inquire, what were the qualities that attended other estates holden by the same tenure.

Or custom of the country.

In the case of Furneaux v. Hutchins, on a question relative to the custom of tithing, (2) Lord Mansfield, after laying down the general rule, that "proof of the custom in one parish is not evidence to affect another parish," adds this qualification, "unless the custom is laid as a general custom of the country.". Thus, where half of a river belongs, by the constant custom of the country, to the lords of the manors on each side of the water, proof of the custom in one manor is evidence of the same customary right in another. (3) It is evidence of a custom pervading one common district of manors. (*e*)

Acts of ownership in other portions of property.

The case of Sir Thomas Stanley v. White (4) may here be mentioned. This was an action of trespass for cutting down the plaintiff's trees; the defendant pleaded his soil and freehold in the close, upon which the trees were growing, &c.: the plain-

(1) Duke of Somerset v. France, 1 Str. 658. See also Lowther v. Raw and others, Fortesc. 44, 55, S. P., on appeal to the House of Lords from the judgment of Lord Talbot, Ch.; Dean and Chapter of Ely v. Warren, 2 Atk. 189, S. P. See also Cowp. 807, 808; 5 T. R. 31; and 1 Maule & Selw. 662.

(2) Cowp. 808.

(3) 1 Maule & Selw. 662.

(4) 14 East, 332. Bryan v. Winwood, 1 Taunt. 208. Tyrwhitt v. Wynne, 2 Barn. & Ald. 554. See Hollis v. Goldfinch, 1 Barn. & Cress. 218, 219.

(*d*) See Note 335, p 455. (*e*) See Note 336, p. 455.

tiff replied that the trees were his trees and freehold. It appeared on the trial, that the trees in question grew in a woody belt, of considerable extent, entire and undivided, which encircled the plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant. Evidence was admitted of several acts of ownership, in different parts of the belt, by those under whom the plaintiff claimed which had been acquiesced in by the owners of the adjoining land. And the Court of King's Bench afterwards, on a motion for a new trial, adjudged the evidence to have been properly admitted, as evidence of the general right through the whole extent of such entire undivided inclosure, which might be presumed to have belonged formerly to one owner. This appears to be the true principle, on which the proposed evidence, in that case, was admissible. For, generally speaking, acts of ownership, submitted to by the holder of one portion of land, cannot be proof that the person exercising them has any right to the adjoining land. (1) (*f*)

Proof of other customs.

The general rule, then, is, that a custom of tithing, &c. in one parish is not evidence of a custom in another. So, in an action by a rector for tithes, where the point in issue is, whether there exists a modus of a certain sum of money for a particular farm in a township within the parish, the defendant will not, in general, be allowed to inquire, whether other farms in the same township are not subject to the same payment. Such an inquiry, however, may be very proper on the other side, in cross-examination, for the purpose of showing that such payments cannot be a modus, consistently with the evidence which has been previously adduced. This was lately adjudged to be admissible in the case of Blundell v. Howard. (2) The question there was not put by the defendant with a view of supporting the modus set up by him, but was put by the plaintiff, in order to show that this and similar payments by the occupiers of different tenements were merely portions of a sum in gross paid throughout the township by way of composition, and could not be a modus, since the ecclesiastical surveys, which had been produced on the part of the rector, were entirely silent as to any modus co-extensive with the township. (*g*)

Custom of tithing.

(1) See 1 Barn. & Cress. 218, 222. (2) 1 Maule & Selw. 292.

(*f*) See note 337, p. 455. (*g*) See Note 438, p. 456.

Character of party.

As evidence is to be confined to the points in issue, the character of either party cannot be inquired into, in a civil suit, unless it is put in issue by the nature of the proceeding itself. (1) Thus, in an action of ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant, witnesses cannot be examined to the defendant's good character. (2) So, on the trial of an information against the defendant for keeping false weights, where it was proposed to call witnesses on behalf of his character, Eyre, C. B. ruled, that such evidence was not admissible in a civil suit. (3) "The offence imputed is not," he said, "in the shape of a crime. To admit such evidence would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime it is admissible, but, where the prosecution is not directly for the crime but for the penalty, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the excise and custom-house laws." (*h*)

On trial for rape.

On the trial of an indictment for a rape, evidence is admissible on the part of the prisoner, that the woman bore a notoriously bad character for want of chastity and common decency, or that she had before been criminally connected with the prisoner; but it cannot be shown, that she had a criminal connection with other persons. (4) And, on an indictment for an assault with intent to commit a rape, general evidence of the woman's bad character, previous to the supposed offence, is clearly admissible; but evidence of particular facts, to impeach her chastity, cannot be received in this case more than in the last, not even for the purpose of contradicting her answers in cross-examination. (5) Her answers to questions, respecting particular facts, not involved in the issue, are conclusive. And if on cross-examination she admit her own misconduct in some earlier transactions, it would be proper, on re-examination, to inquire into her conduct subsequent to such transactions, for the purpose of restoring her credit. Other witnesses may also be called, to show that she has since retrieved her character. (6) (*i*)

Assault with intent.

(1) Bull. N. P. [298.]
(2) Goodright dem. Farr v. Hicks, Bull. N P. 296.
(3) Attorney General v. Bowman, 2 Bos. & Pull. 532, (a).
(4) Hodgson's case, 1812, MS. Russ. & Ry. Cr. C. 211. S. C.
(5) R. v. Clarke, 2 Stark. N. P. C. 243, by Mr. Justice Holroyd.
(6) Ibid. 242.

(*h*) See Note 339, p. 456. (*i*) See Note 340, p. 458.

In trials for felony and high treason, and in trials also for misdemeanors, (where the direct object of the prosecution is to punish the offence,) the prisoner is always permitted to call witnesses to his general character, (*j*) and in every case of doubt, proof of good character will be entitled to great weight. (*k*) The inquiry as to the prisoner's general character ought manifestly to bear some analogy and reference to the nature of the charge against him. On a charge of stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption, that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question. The inquiry must also be as to the *general* character: for it is general character alone which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation down to a certain period, would not then begin to act a dishonest unworthy part. Proof of *particular* transactions, in which the defendant may have been concerned, is not admissible, as evidence of his general good character. (*l*) What, then, is evidence of general character? The best medium of proof is, by shewing how the person stands in general estimation; proof that he is reputed to be honest is evidence of his character for honesty, and the species of evidence most properly resorted to in such inquiries. It frequently occurs, indeed, that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favor to the prisoner, than strictly as evidence of general character. (1) (*m*) In cases where the intention forms a principal ingredient in the offence, a wider scope is allowed. On a charge of murder, for instance, expressions of good will and acts of kindness on the part of the prisoner towards the deceased, are always considered important evidence, as shewing what was his general disposition

Proof of good character.

Upon what points.

General character.

Particular acts.

(1) See 31 Howell, 190, 310.

(*j*) See Note 341, p. 459. (*k*) See Note 342, p. 459. (*l*) See Note 343, p. 460. (*m*) See Note 344, p. 460.

towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes. (*n*)

Rule in criminal cases.

The rule, that all manner of evidence ought to be rejected which is foreign to the points in issue, applies more strongly, if possible, to criminal prosecutions than to civil cases. This rule is founded in common justice; for no person can be expected to answer, unprepared and at once, for every action of his life. In treason, therefore, no evidence is to be admitted of any overt act that is not expressly laid in the indictment. This was the rule at common law: and it is again prescribed and enforced by the statute of W. 3, which contains an express provision to that effect, (1) in consequence of some encroachments that had been made in several state prosecutions. (2) The meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt act amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts. (3) With this view, the declarations of the prisoner, and seditious language used by him, are clearly admissible in evidence, as explaining his conduct, and shewing the nature and object of the conspiracy. (4) And acts of treason, tending to prove the overt acts charged, though committed in a foreign country, may be given in evidence. (5) (*o*)

Treason.

Proof of overt-acts.

Burglary.

On the trial of an indictment for burglary and larceny, (6) it appeared upon the evidence, that the prisoners might have entered the house before it was dark, and that they had not taken any part of the goods at the time when they were discovered in the house; upon which the counsel for the prosecution proposed

(1) W. 3, c. 3, s. 8.

(2) Foster, Cr. L. 245, 246.

(3) Id. 9, 246. Vaughan's case, 5 St. Tr. 2, fol. ed. S. C. 13 Howell's St. Tr. 453. Deacon's case, 9 St. Tr. 8, fol. ed. S. C 15 Howell's St. Tr. 747.

(4) R. v. Watson, 2 Starkie, N. P. C. 134. So on an indictment for sending a threatening letter, a subsequent letter from the prisoner, explanatory of that stated on the record, is admissible. Robinson's case, 2 East, P. C. 1112.

(5) Fost. Cr. L. 10. Deacon's case, 9 St. Tr. 8, fol. ed. S. C. 15 Howell's St. Tr. 747.

(6) R. v. Vandercomb and Abbott, 2 Leach, Cr. C. 816.

(*n*) See Note 345, p. 461. (*o*) See Note 346, p. 461.

to give evidence of a larceny in the house committed by the prisoners on a preceding day; but the Court rejected the evidence, on the ground that it tended to prove a felony of a totally distinct kind, which had no reference to the subject matter of the prosecution; the prisoners were, therefore, acquitted on this charge, but afterwards indicted again for the other offence, and convicted.

Proof of other acts of prisoner.

Although it is usual to confine the prosecutor to one single act of felony, yet when the character of the particular act, charged against the prisoner, is to be collected from other acts done by him, all of them constituting one entire transaction, it is discretionary in the judge to allow the prosecutor to go into the whole.(1) (*p*)

In a prosecution for uttering a bank note, bill, or promissory note, with knowledge of its being forged, proof that the prisoner had uttered other forged notes or bills of the same kind, (2) (*q*) or that he had other forged notes or bills of the same kind in his possession, (3) (*r*) is clearly admissible, as shewing that he knew the note or bill in question to be forged. And on a prosecution for uttering counterfeit money, the fact of the prisoner having other counterfeit money upon him, or of his having uttered other pieces of money of the same kind, is evidence of his having known, that the money, which he is charged with uttering, was counterfeit; (4) (*s*) and proof of the prisoner's conduct in such other utterings, (as, for example, that he passed by different names,) is, for the same reason, clearly admissible. (5) (*t*) Such evidence, far from being foreign to the point in issue, is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge: and it would seldom be possible to ascertain, under what circumstances the uttering took place, (whether from

Proof of other acts as evidence of intention.

Uttering other notes or money.

(1) R. v. Ellis, 6 Barn. & Cress. 145, by Lord Tenterden, C. J. See also Egerton's case, Russ. & Ry. Cr. C. 376.

(2) R. v. Wylie, 1 New Rep. 92. R. v. Ball, 1 Campb. 324. Russ. & Ry. Cr. C. 132, S. C.

(3) R. v. Hough, Russ. & Ry. Cr. C. 120. R. v. Rowley, Bayley on Bills, 447. The forgery of the other notes or bills must be distinctly proved; and they ought to be produced, R. v. Millard, Bayley on Bills, 449. Russ. & Ry. Cr. C. 245, S. C. There is great authority for holding, that proof of utterings of forged bills or notes of a *different kind*, is also admissible. Bayley on Bills, 4th ed. 450.

(4) 1 New. Rep. 95.

(5) See R. v. Millard, Bayley on Bills, 449.

(*p*) See Note 347, p. 462. (*q*) See note 348, p. 462. (*r*) See Note 349, p. 464. (*s*) See Note 350, p. 464. (*t*) See Note 351, p 465.

Proof of other acts of prisoner.

ignorance, or with an intention to commit a fraud,) whithout inquiring into the demeanor of the prisoner in the course of other transactions. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment; and the question then would be, whether the evidence is sufficient to warrant the inference of knowledge at one time, from such particular transactions at another time. (1) That is a question entirely for the jury. But whatever weight the evidence may have, (which is quite another consideration,) it is clearly admissible; not as evidence of another offence, but simply of another transaction, in which the prisoner was engaged.

Conspiracy to cheat.

On an indictment against several prisoners, for a conspiracy to carry on the business of *common cheats*, proof is admissible, that the prisoners, at a different time, made similar representations to other tradesmen besides those named on the record : (2) (*u*) cumulative instances are necessary to prove the offence ; the same sort of evidence is allowed in a prosecution for barratry, and, as before mentioned, in prosecutions for the greatest of all offences, high treason. (*v*)

Murder.

The same kind of proof is constantly admitted in trials for murder ; in which former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased. (*w*)

Conspiracy to riot.

On the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those, employed to disperse the meeting, may have been at the time of the dispersion, if no evidence has been previously offered, on the part of the prosecution, as to the conduct of the meeting at that time or subsequently ; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself ; in other words, it is irrelevant to the matters in issue. (3) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the par-

(1) New. Rep. 94.
(2) R. v. Roberts, 1 Camph. 400.
(3) R. v. Hunt, 3 Barn. & Ald. 566, 577.

(*u*) See Note 352, p. 465. (*v*) See Note 353, p. 465. (*w*) See Note 354, p. 465.

ticular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner, and acting in concert. It would be relevant also to shew, that early on the day of the meeting, in a spot at some distance from the place of meeting, (from which very spot a body of men came afterwards to the place of meeting,) a great number of persons, so organized, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner. (1) Further, it would be relevant, on such a trial, to produce in evidence certain resolutions, which had been proposed, by one of the defendants, at a large assembly in another part of the country, very recently held for the same professed object and purpose as were avowed by the meeting in question, that defendant having acted at both meeting as president or chairman; in a question of intention, as this is, it is most clearly relevant to shew, against that individual, that, at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. (2)

Proof of other acts of prisoner.

It would not be allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him. Thus, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that he had a tendency to such practices, ought not to be received in evidence. (3)

As, in trials for conspiracies, whatever the prisoner may have done or said, at any meeting alleged to be held in pursuance of the conspiracy, is admissible in evidence against him, on the part

Acts and declarations of prisoner when evidence for him.

(1) R. v. Hunt, 3 Barn. & Ald. 573, 574.

(2) R. v. Hunt, 3 Barn. & Ald. 568, 572. The Court of King's Bench also decided, in this case, that a written paper, delivered by the defendants to a person at the meeting, as a copy of the resolutions about to be proposed, and proved by that person to correspond with the resolutions afterwards read at the meeting, is good evidence of such resolutions; without previous notice to the defendant to produce the paper, from which they were read

(3) R. v. Cole, Mich. term. 1810, by all the judges, MS.

Proof of other acts of prisoner.

of the prosecution; so, on the other hand, any other part of his conduct at the same meetings, will be allowed to be proved, on his behalf; for the intention and design of the party, at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. In the case of Walker and others, (1) who were tried for a conspiracy to overthrow the government, evidence having been produced, on the part of the prosecution, to shew that the conspiracy existed and was brought into overt-act at meetings in the presence of Walker, the counsel for the prisoners was allowed to ask a witness, whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject? The question was opposed, but held by Mr. Justice Heath to be admissible. The prisoner's counsel were also allowed, in the same case, to inquire into the general declarations of the prisoner at those meetings, whether the witness had heard him say any thing that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession.

Part of the transaction proved against him.

The question, in the case last cited, was expressly confined, and so required by the Court to be, to the conduct of the prisoner at those particular meetings, which had been previously inquired into on the part of the prosecution. Proof of what the prisoner might have said or done at other meetings, or at other times, unconnected with the transactions proved against him, would not have been admissible evidence in his favor. In Lord George Gordon's case, (2) a witness was asked by the prisoner's counsel, on cross-examination, as to a statement made by the prisoner, on the night before the meeting in St. George's Fields, and with respect to which meeting much evidence had been produced. This was objected to; and the Court decided, that the question was not regular. Lord Mansfield held, that as the counsel for the crown had given evidence of what the prisoner said at the meeting upon the 29th May, the counsel for the prisoner might shew the whole connection of what the prisoner said besides at that meeting; but that they could not go into evidence of what he said on the antecedent

(1) 23 Howell, 1131, and see 31 Howell's St. Tr. 43.

(2) 21 Howell's St. T. R. 542.

day. And in Hanson's case, (1) on a charge for promoting a riot, the counsel for the prisoner was not allowed to prove what he had said, privately to a friend, previous to his going to the place of riot, respecting his motive in going thither. And many other cases might be cited to the same effect.

Proof of other acts of prisoner.

The rule, on this subject, appears to have been extended much beyond the line here laid down, on the trial of Horne Tooke. (2) In that case, several publications were given in evidence, on the part of the crown, containing republican opinions, which had been distributed by the prisoner during the period assigned in the indictment for the existence of the conspiracy; and this evidence was much relied on, as shewing that the notion of a reform, which was expected to be set up by the prisoner in his defence, was a mere pretext to cover his treasonable designs: to repel this conclusion, the counsel for the prisoner offered in evidence a book, which had been written by the prisoner twelve years before, on the subject of parliamentary reform; the evidence was objected to, as having no relation with the particular transaction in question, and because the prisoner's opinions, whatever they were formerly, might have afterwards changed. But the Lord Ch. J. Eyre said, that the question was not whether this book had a reference to the conspiracy charged, but whether it had not reference to the proof given in support of the charge: and he thought it evidence to rebut the supposition, that the reform of parliament was a pretence made by the prisoner. The book was accordingly received in evidence. There is great authority, however, for doubting, whether such evidence would, on revision, be considered strictly admissible. (3) It seems, indeed, reasonable, if some other acts of the prisoner, besides those charged in the indictment, are proved against him for the purpose of shewing his design in the affair in question, that he should be allowed to explain those acts by proof of other *contemporaneous* particulars of his conduct, which shew that he had a different design from that imputed to him. But this limitation (namely, that such other particulars, offered in evidence

H. Tooke's case.

(1) 31 Howell's St. Tr. 4281.

(2) 1 East, P. C. 62, Gurney's Report, vol. ii. 36. 25 Howell's St. Tr. 345, S. C.

(3) See the observations on this point by Lord Ellenborough, C. J., in R. v. Lambert and Perry, 31 Howell's St. Tr. 355, S. C. 2 Campb. N. P. C. 400.

Proof of other acts of prisoner.

by the prisoner, ought to be contemporaneous with those proved on the other side, or at least confined within the same limits, to which the evidence on the part of the prosecution is subject,) appears to be just and necessary; for, otherwise, the prisoner would be at liberty to take the whole range of his life, in the course of which his character and his designs may have undergone a complete change.

Hardy's case.

In Hardy's case, (1) great liberty was allowed to the counsel for the prisoner, in examining into particulars of his conduct, even into his speculative opinions; and perhaps it may be questionable, whether the rule was not carried to its utmost extent in that case. The question there put to the witness was this: whether, from his personal acquaintance with the prisoner, he had ever heard him state, what was his plan of reform? This question was objected to. The overt-act charged was, that the prisoner, for the purpose of accomplishing the treason of compassing the king's death, did conspire with others to call a convention of the people, in order that the convention might depose the king; and the counsel for the prisoner submitted, that for the purpose of shewing that the convention was intended to be held, not with the design imputed by the indictment, but with an innocent design, they might go into evidence of what the prisoner had at other times declared, inasmuch as the counsel for the prosecution had gone into all that the prisoner had, at any part of his life, declared touching this fact, and had gone also into evidence of what other members of the corresponding societies had said. They then defended the question by an able argument, in the course of which several cases were cited from the State Trials; particularly the case of Lord Russel, the one which came nearest in principle to that under discussion, where the charge against the prisoner was for compassing the king's death, and the overt-act was, consulting to raise rebellion and seize the king's guards; and Lord Russel, in his defence, called many witnesses to speak to his affection towards the government, and his detestation of risings against it; some of the witnesses gave evidence of his conversations and

Lord Russel's case.

(1) 24 Howell's State Trials, 1065, O'Connor, 27 Howell's St. Tr. p. 31, 1093. See trial of O'Coigly and and 31 Howell's St. Tr. 189, 310.

sentiments on this subject, shewing his aversion to all risings of the people: Doct. Burnet and Doct. Cox, in particular, spoke fully to this point, and without any objection either from the court or from the counsel for the prosecution. After the question, in Hardy's case, had been argued at some length, Lord Ch. J. Eyre is reported to have thus addressed himself to the prisoner's counsel, (1) "I do not know whether you can be content to acquiesce in the opinion, that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear, as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, because the presumption, upon which declarations are evidence, is, that no man would declare any thing against himself, unless it were true; but that every man, if he were in difficulty, or in apprehension of any difficulty, would make declarations for himself. Those declarations, if offered as evidence, would be offered, therefore, upon no ground which entitles them to credit. That is the general rule. But if the question be, what was the political speculative opinion which this man entertained, touching a reform of parliament, I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place." (2) The question afterwards put to the witness, was, whether, before the time of the convention which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business? and, in answer, the witness stated what he had heard from the prisoner respecting his plan of reform. (3)

Proof of other acts of prisoner.

The rule, which is now the subject of discussion, (namely, that evidence is to be confined to the points in issue,) will be further illustrated by considering the effect of judgments by default of the

(1) 24 Howell's St. Tr. 1094.

(2) As to the extent of this rule, to conversations "*at any time*" however remote; see supra, p. 183.

(3) 24 Howell's St. Trials, p. 1097. Another question, which is stated to have been put by the prisoner's counsel to one of the witnesses, and allowed to be answered, was, as to what the prisoner had declared to be the object of the corresponding societies? This question was not opposed. Ib. p. 1101.

payment of money into court, and of particulars of demand under a Judge's order. First, as to judgments by default.

Judgment by default.

A judgment by default is an admission of the cause of action. Thus, in an action on a bill of exchange against the defendant as acceptor, it admits, that he accepted it, and that the bill is as stated in the declaration; and he cannot afterwards shew, on the execution of a writ of inquiry, that he had not accepted it; (1) nor can he object to the sufficiency of the stamp, on which the bill is drawn; the only use in producing the bill is, for the purpose of seeing whether there is any indorsement upon it, of money having been paid. (2) So, in an action for goods sold and delivered, or for money had and received, the defendant, by suffering judgment to go by default, admits that something is due; and he cannot afterwards dispute the contract of sale, or shew fraud on the part of the plaintiff in making the contract; (3) but the plaintiff will only have to prove the amount due to him. (*x*) So, on the execution of a writ of inquiry after judgment on demurrer, the defendant cannot controvert any thing but the amount of the sum in demand: as, in an action for goods sold and delivered, to which the defendant pleaded coverture, and the plaintiff replied, that the defendant's husband had resided abroad, and that the defendant, during all the time, &c. had carried on trade as a *feme sole*, the Court were of opinion, that, after judgment on demurrer to this replication, evidence of the wife having acted as agent to the husband ought not to have been admitted on the execution of the writ of inquiry; that the only question, to be decided by the jury, was the amount of the debt, and that the question, whether the debt had been contracted by the defendant as agent for her husband, or in her separate capacity, ought to have been considered as determined by the record. (4) * (*y*)

Judgment on demurrer.

(1) Greene v. Hearne, 3 T. R. 301. Bevis v. Lindfell, 2 Str. 1149.

(2) 3 T. R. 302. Billers v. Bowles, Barnes' Rep. 233. Ellis v. Wall, ib. 234. Bayley on Bills, 227; and Mills v. Lyne, 385, MS. case there cited.

(3) East India Company v. Glover, 1 Str. 612.

(4) De Gaillon v. L'Aigle, 1 Bos. & Pull. 368.

* After judgment by default against one of two defendants, the plaintiff may elect to be nonsuited on the trial of the issue joined by the other defendant. Murphy v. Doulan, 5 Barn. & Cress. 178.

(*x*) See Note 355, p. 466. (*y*) See Note 356, p. 466.

Payment of money into court.

Secondly, as to payment of money into court. Such payment is in general an acknowledgment of the right of action to the amount of the particular sum. (1)* And as it is an acknowledgment on record, the party cannot recover it back, although he has paid it wrongfully or by mistake.(2) It is an admission by the defendant, that the plaintiff has a legal demand to a certain extent. But it is not an acknowledgment beyond that amount, and will not preclude the defendant from taking any objection to the action with respect to any other part of the demand, to which the payment of the money does not apply, although, if no money had been brought into court, the objection might have been a bar to the whole demand. (3)

Special contract, and common counts.

Where there is a count on a special contract together with money counts, payment of money generally upon the whole declaration is an admission of the contract on every count, to which the contract is in its nature applicable; and after such an admission, the defendant will be precluded from disputing the existence of the contract as stated.(4) Thus in the case of Cox v. Brain, (5) where the declaration stated a specific bargain to pay a particular sum of money for certain articles, a general payment of part of the money into Court, by admitting the bargain, admitted also the sum which was originally due; and the only question that could be raised after that admission, would be, whether the remainder of the money had been previously paid. If the contract had been to pay, not any particular price, but the average price at which such articles were sold, to be ascertained by a certain time, a general payment of money into Court would not have admitted the amount of the breach as stated in the declaration, though it would admit a cause of action on each count, and something due on each of the breaches: the contract is admitted, but not the averment of the average price. (6) (*z*)

(1) 5 Burr. 2640. 1 T. R. 465. 2 East, 134. 1 Barn. & Cress. 4. 3 Barn. & Cress. 10.

(2) Vaughan v. Barnes, 2 Bos. & Pull. 392. Malcolm v. Fullarton, 2 T. R. 645.

(3) Cox v. Parry, 1 T. R. 464. Mellish v. Allnut, 2 Maule & Selw. 106. Blackburn v. Scholes, 2 Campb. 341.

(4) Bennet v. Francis, 2 Bos. & Pull. 550.

(5) 3 Taunt. 95. 2 Barn. & Ald. 118.

(6) Stoveld v. Brewin, 2 Barn. & Ald. 116.

* And the plaintiff may elect to be nonsuited, after payment of money into court by the defendant. Cotterel v. Apsey, 6 Taunt. 324.

(*z*) See Note 357, p. 467.

Payment into court.

Common counts.

In an action of assumpsit for goods sold and delivered, and on the money counts, to which the defendant pleads the general issue, and the statute of limitations, payment into court generally does not take the case out of the statute. (1)

Bill of exchange.

Covenant.

Jurisdiction of court.

In an action on a bill of exchange, the defendant by paying money into court generally, dispenses with the regular proof of the party's hand-writing, (2) and cannot object to the sufficiency of the stamp on which the bill is drawn. (3) So, in an action of covenant, he admits the execution of the deed. (4) On the same principle, payment of money into court admits the plaintiff's right to sue in that court; (5) it admits also the title on which he sues, as, for instance, his being a surgeon, (6) or farmer of tithes, &c. (7)

Policy.

Where the defendant has paid money into court generally, upon a declaration containing a count on a policy of insurance together with money counts, he will not afterwards be permitted to shew, that the policy was originally different, and has been altered by the broker without his knowledge. (8) (*a*)

Sale by sample.

In an action to recover the amount of the sale of goods, which have been sold by sample at a particular price, the defendant will not be allowed to shew, after such general payment into court, that the goods were of a quality inferior to the sample. (9)

Agreement to pay another's debt.

In an action upon a promise to pay another person's debt, the defendant cannot insist, after paying money into court, on the count charging him with such promise, that the promise is not binding, because not written and signed, as the statute of frauds directs; for he has admitted the agreement to be binding to a certain extent, and disputes only the amount of the debt. (10)

(1) Long v. Greville, 3 Barn. & Cress. 10.

(2) Gutteridge v. Smith, 2 H. Bl. 374. Middleton v. Brewer, Peake, N. P. C. 15.

(3) Israel v. Benjamin, 3 Campb. 40.

(4) Radnal v. Lynch, 2 Campb. 357. Watkins v. Towers, 2 T. R. 275.

(5) Miller v. Williams, 5 Esp. N. P. C. 19.

(6) Lipscombe v. Holmes, 2 Campb. 441.

(7) Broadhurst v. Baldwin, 4 Price, 58.

(8) Andrews v. Palsgrave, 9 East, 325.

(9) Leggett v. Cooper, 2 Starkie, N. P. C. 103.

(10) Ramsbottom v. Brewer, Peake, N. P. C. 15.

(*a*) See Note 358, p. 469.

Payment into court. Illegal contract.

Payment of money into court is an admission only of a legal demand. If the contract declared upon be illegal, the defendant cannot give it validity by his admission; no admission of the parties will oblige the court to give effect to an illegal transaction. (1)

Although payment of money into court admits the contract, that is, the entire consideration for the act and the entire act which is to be done for such consideration, yet it will not be an admission of other parts of the contract, which are distinct and collateral, respecting the liquidation of damages after breach of the contract. (2) If indeed the provision is of such a nature as will discharge the defendant from all liability under the contract, unless the plaintiff has complied with the condition, (as was the case in Clay v. Willan, (3) where the goods were not to be accounted for to any amount, unless properly entered and paid for,) that will not merely operate in reduction of the damages, but in bar of the action; and therefore, in such a case, if the defendant pays money into court on a declaration against a carrier in the common form, he cannot afterwards give in evidence such a provision, which entirely negatives the contract as stated in the declaration.

Proof of payment.

Payment of money into court ought to be proved by the production of the rule of court, or by the office copy of the rule. It will not be sufficient to call the attorney, who has taken the money out of court. (4) The production of the rule by the defendant does not entitle the plaintiff to a reply. (5)

Bill of particulars.

Thirdly, as to bills of particulars.—It has been before mentioned, that a bill delivered, by an attorney to his client for business done during a certain period, or to a tradesman for goods sold, is strong presumptive evidence against any additional item within the same period. The party is not however precluded from shewing, that items, included in a subsequent bill, have been omitted by mistake in the former bill, and that the business, which is the

(1) Ribbans v. Cricket, 1 Bos. & Pull. 264. 2 East, 134.
(2) See Clarke v. Fray, 6 East, 564.
(3) 1 H. Bl. 298. 6 East, 574.
(4) Israel v. Benjamin, 3 Campb. 40. As to the commencement of the practice of paying money into court, see 2 H. Bl. 376; 1 Ld. Raym. 254.
(5) 2 Taunt. 267.

Bill of particulars. Its effect.

subject of the charge, has been done by him for the defendant. A bill of particulars, delivered under a judge's order, is more conclusive; its sole object is to inform the opposite party of what he ought to come prepared to try; and it will effectually preclude the party, who delivers it, from giving evidence of any other demand not there stated. (*b*)

Confined to part of demand

Thus, where a declaration contained a count for money had and received for the plaintiff's use, and also a demand for horses sold by the plaintiff to the defendant himself, and the bill of particulars specified the demand alone, it was decided that the plaintiff could not give evidence of horses being sold by the defendant as the plaintiff's agent;(1) for a contract for the absolute sale of horses to the defendant is essentially different from a contract to repay money received on a sale of horses by commission; and the proceeds of such a sale by the defendant could only be recovered under the count for money had and received, which the plaintiff abandoned by confining his bill of particulars to the demand stated in the other count.

Where the declaration contains a count on a promissory note, together with money counts, and the particular of demand includes only the note, the plaintiff will not be allowed to prove the consideration for which the note was given, in order to recover under the money counts; and if he cannot recover upon the note on account of the want of a proper stamp, he will be nonsuited. (2)

Second particular.

Although the plaintiff, on perceiving the defect of his first particular of demand, which only mentions the promissory note, delivers a second bill of particulars large enough to comprehend the original debt, yet this will not avail him, unless the second particular has been delivered under a Judge's order. (3) (*c*)

Particulars not abridged by demand.

On the other hand, if the plaintiff, either before or after delivering a bill of particulars under a Judge's order, makes a demand of payment only for a part of the articles specified in

(1) Holland v. Hopkins, 2 Bos. & Pull. 243.

(2) Wade v. Beasley, 4 Esp. N. P. C. 7.

(3) Brown v. Watts, 1 Taunt. 353.

(*b*) See Note 355, p. 469. (*c*) See Note 360, p. 469.

the bill, such a demand will not have the effect of confining him in his evidence, nor supersede the bill of particulars. (1) Bill of particulars.

In an action on a note, if the plaintiff is entitled to recover the principal sum due, he may recover interest also, as arising out of the principal and incident to it, though it has not been specifically claimed in the particular of demand. (2) Interest on note.

In an action of assumpsit, where the defendant pleaded in abatement, that the promises were made by himself and another person jointly, on which plea issue was joined, and on the trial it appeared from the bill of particulars, that some of the articles had been furnished to the defendant jointly with the person named in the plea, Lord Kenyon C. J. held that the plaintiff was bound by his bill of particulars, which supported the defendant's plea: and therefore he nonsuited the plaintiff. (3) Here the articles stated to have been furnished on the joint credit of the defendant and another person, were items of the plaintiff's demand; and were a necessary part of his bill of particulars, if he intended to recover for them. (*d*) Particular evidence against defendant.

The use of a bill of particulars is to prevent the inconveniences which might otherwise arise from the general and undefined statements in the plaintiff's declaration, and to apprise the defendant of the particulars of the demand, which the plaintiff has against him. (*e*) If it gives sufficient information to the opposite party to guard him against surprise, it answers the purpose for which it was intended, and will be sufficient, though it may be in some respects inaccurate. (*f*) Error in particular.

Thus, in an action of assumpsit for money paid to the defendant's use, where in the bill of particulars an item for money advanced was by mistake written under the name of A. B., instead of being written under that of C. D. in another part of the particular, and this appeared to have been advanced to the former, Lord Ellenborough allowed the plaintiff to prove, that the item in question

(1) Short v. Edwards, 1 Esp. N. P. C. 373.

(2) Blake v. Lawrence, 4 Esp. N. P. C. 147.

(3) Colson v. Selby, 1 Esp. N. P. C. 451. A rule to set aside the nonsuit was afterwards refused by the Court.

(*d*) See Note 361, p. 469. (*e*) See Note 362, p. 470. (*f*) See Note 363, p. 471.

Bill of particulars.

Clerical error.

Error in date.

was intended, and must have been understood, to refer to the latter name, but by mere clerical error had been misplaced; and that if the defendant could shew by affidavit, that he had been misled by the plaintiff's particular, it might furnish a ground for the Court afterwards to set aside that particular sum. (1) So where the work for which the action was brought was stated by the particular to have been done in a wrong month, when in fact no work had been done, the plaintiff was allowed to give evidence of his having done work for the defendant in the other month. (2)

In the case of Hurst v. Watkis, which was an action brought by one partner against another to recover a balance due on a statement of accounts, and on which the bill of particulars was confined to the balance due on *separate* accounts, the plaintiff, in support of this demand, gave in evidence an account, in which the defendant made himself debtor to a certain amount, and the defendant in answer to this evidence produced an account subsequently rendered by the plaintiff, according to which there appeared to be a balance due to the defendant on the separate accounts; but on the opposite side of the page, there was a statement also of the partnership accounts, on which the balance was in favor of the plaintiff, and greatly exceeded the balance on the separate account. It was objected that the plaintiff could not recover beyond his particular: the Court however said, that the defendant himself had given the plaintiff a better case than he was at liberty to make for himself, and that the plaintiff was entitled to a verdict for all that had been proved to be due to him. (3) The parties afterwards came to a compromise, and agreed upon the sum to be recovered. It is to be observed, that there were peculiar circumstances in this case; the written paper, which the defendant gave in evidence, as the writing of the plaintiff, could only have been admitted as one entire writing, the whole to be taken together, and was not admissible merely in parts; the defendant could not use in evidence the separate account of the plaintiff, without admitting also the part-

(1) Day v. Bower, 1 Campb. 69, n. Brown v. Hodgson, 4 Taunt. 198. See also Davies v. Edwards, 3 Maule & Selw. 380, an action of debt to recover rent, where the locality of the premises, not described in the pleadings, had been misdescribed in the particular; but the objection was overruled.

(2) Millwood v. Walter, 2 Taunt. 224.

(3) Hurst v. Watkis, 1 Campb. 68.

nership a[illegible], which was written by him on the same paper, since the one part might have explained or referred to the other; and if the statement of a party is given in evidence against himself, the whole of the statement ought to be received, though all its parts may not deserve the same credit. But it appears to be too much to infer generally from the authority of this case, that, because the evidence, adduced by the defendant, discloses other items, which might have been included in the bill of particulars, the plaintiff ought therefore to recover on these items, as well as upon those which are specifically mentioned. The case in question must be considered as a particular exception, and not as establishing a rule of so wide and general a nature. The plaintiff, it is presumed, can neither cross-examine the defendant's witnesses to any claim, which he has not comprehended in his particular of demand, nor can he at the trial avail himself of any such claim, though disclosed by the witnesses on the other side in their examination in chief. (*g*) Bill of particulars.

An order for particulars of a set-off calls upon the defendant to deliver the particulars within a limited time, and, in default thereof, expressly precludes him from giving evidence in support of his cross-demand. This is the general form of such an order. (1) (*h*) If it does not specify a certain day, before which the particulars are to be delivered, but only requires them to be delivered forthwith, and they are not delivered till many days after, so as to embarrass the plaintiff for want of time, he has a remedy by applying to the Court, and he ought not to wait till the time of trial before he objects to the lateness of the delivery; by accepting the particulars, and not making an application to the Court, he waives the objection. (2) (*i*) Delivery of particular.

The particulars of demand are proved by the production of the Judge's order, and by proof of the delivery of the particulars; and this delivery will be sufficiently proved by proving the signature of the party's attorney, or of his agent, on the particulars. (*j*) Proof of particular.

(1) See form, in Tidd. App. ch. 22. s. 10.

(2) Lovelock v. Chiveley, Holt, N. P. C. 552.

(*g*) See Note 364, p. 474. (*h*) See Note 365, p. 474. (*i*) See Note 366, p. 474. (*j*) See Note 367, p. 475.

Sect. IV.

The Affirmative of the Issue to be proved.

There are several general rules, of great use in ascertaining whether the plaintiff or defendant will have to prove the issue on the record. One of the most useful of these is the rule, which has been taken as the subject of the present section, namely, that the point in issue is to be proved by the party who asserts the affirmative; according to the maxim of the civil law. "*Ei incumbit probatio qui dicit, non qui negat.*" (1) (*k*) A few instances will be sufficient to illustrate this rule.

Action for loss by barratry.

In an action for a loss, occasioned by barratry in the master of a ship, where it was objected by the defendant, that the plaintiff ought to prove, that the master was not also the owner or freighter, and that he did not act under the direction of the person who was, (in which case barratry could not be committed,) the Court held, that, if the master was owner or freighter, or acted under the direction of the owner, the burthen of proving that fact lay on the defendant. (2) "It was not incumbent on the plaintiff," said Mr. Justice Buller, "to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were not the owner, it is immaterial who was; proof of that fact, which operates in discharge of the other party, lies upon him." (*l*)

Plaintiff's entire case to be proved.

But although it may lie on the defendant to prove an affirmative, yet the plaintiff, if he has notice of the defence, cannot defer the concluding of his entire case until the affirmative is first established. Thus, if the plaintiff bring an action against the defendant for some act done by him, and the defendant plead the general issue, and in bar of the action plead further an illegal act done by the plaintiff, such as would justify the defendant in doing the act which is the subject of the suit, here the plaintiff will have to prove the whole of his case in the first instance; he ought not only to prove his right of action, but also negative the act imputed to him by the defendant's plea. Thus, in the case of Rees v. Smith, (3) which was an action of trespass for breaking into the plaintiff's house, and seizing his goods,

Trespass.

(1) Justin. Pand. Lib. 22, Tit. 3. De Probationibus, Art. 1, 2.

(2) Ross v. Hunter, 4 T. R. 33, 38.

(3) 2 Starkie, N. P. C. 30.

(*k*) See Note 368, p. 475. (*l*) See Note 369, p. 478.

and the defendant pleaded, besides the general issue, a fraudulent removal of the goods to avoid a distress for rent, the plaintiff at first only proved the trespass, the defendant then gave evidence in support of his plea, after which the plaintiff's counsel offered general evidence, to negative the supposition of a fraudulent removal, but Lord Ellenborough rejected the evidence. "The general rule," he said "is, that when the defence is known, by pleading, or by means of notice, the counsel for the plaintiff is bound to open the whole case in chief, and cannot proceed in parts. If," added Lord Ellenborough, "any one fact be adduced by the defendant, to which an answer can be given, the plaintiff must have an opportunity given for so doing: but this must be understood of a specific fact: he cannot go into general evidence in reply to the defendant's case. There is no instance, in which the plaintiff is entitled to go into half his case, and reserve the remainder."(*m*)

Charge of breach of duty.

And where one party charges another with a culpable omission or breach of duty, the general rule, above laid down, does not apply. In such a case, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary is proved." (*n*) Thus, in a suit for tithes in the Spiritual Court, where the defendant pleaded, that the plaintiff had not read the thirty-nine articles, the Court called on the defendant to prove the fact, though a negative: upon which, he moved the Court of King's Bench for a prohibition; but it was refused, for the reason already stated. (1)

Reading thirty nine articles.

Putting on board combustibles.

In an action by the owner of a ship against the defendants, for putting on board a quantity of combustible and dangerous articles, "without giving due notice thereof," the Court held, that it lay upon the plaintiff to prove this negative averment. (2) (*o*) In an action, for the recovery of penalties, under the hawkers' and pedlers' act, (3) against a person charged with having sold goods by auction, in a place in which he was

(1) Monke v. Butler, 1 Roll. Rep. 83, cited by Lord Ellenborough, 3 East, 199. Powell v. Millbank, 2 Black. Rep 851, S. P. 3 Wils. 355, S. C. See also Lord Halifax's case, Bull. N. P. (298.) Rex v. Combs, Comb. 357. Gilb. Ev. 132.

(2) Williams v. East India Comp. 3 East, 193, 199. Rex v. Hawkins, 10 East, 211.

(3) St. 29 G. 3, c. 26, s. 4.

(*m*) See Note 370, p. 479. (*n*) See Note 371, p 483. (*o*) See Note 372, p. 486.

not a householder, so [illegible] proof of this negative, namely, of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. (*p*) And in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises well repaired at the end of the term, the proof of the breach lies upon the plaintiff; this breach, though in terms it involves a negative, admits of as easy proof, as if it had been expressed in the affirmative. (*q*)

Covenant to repair.

Prosecution for coursing without consent.

On the trial of an indictment on the statute 42 G. 3, c. 107, s. 1, which makes it felony to course deer on an inclosed ground "without the consent of the owner of the deer," it ought to appear from the evidence produced on the part of the prosecution, that the owner had not given his consent. According to the report of a late case, (1) it seems to have been thought necessary to call the owner of the deer, for the purpose of disproving his consent; and the owner not being called, the jury were directed to find a verdict of acquittal. The particular circumstances of that case are not stated in the report; and it is not easy to discover upon what principle such evidence was held to be indispensable. If the circumstances were of such a nature as to raise a reasonable presumption, that what had been done had not been done illegally (which, however, it is difficult to conceive,) then, doubtless, the direct evidence of the owner would be necessary to repel that presumption, and to establish the charge against the prisoner. But, as a general proposition, it may be safely laid down, that the non-consent of the owner may be properly inferred from the conduct of the prisoner, and the circumstances under which the act was done, such as the secrecy of the proceedings, the attempt to conceal, the disguise of the prisoner, or his resistance, or any other circumstance of guilt; and that the evidence of the owner, to negative the supposition of his consent, is not more strictly necessary to this prosecution than on a charge of larceny, in which it is an essential ingredient, that the goods should have been taken against the owner's consent; and yet the owner is never questioned as to that point, though he is generally called to prove the property. (*r*)

(1) R. v. Rogers, 2 Campb. 654, Mallinson, 2 Burr. 679. R. v. Corden, by Mr. Justice Lawrence. See R. v. 4 Burr. 2279.

(*p*) See Note 373, p. 486. (*q*) See Note 374, p. 486. (*r*) See Note 375, p. 487.

Where the presumption of law is in favor of the defendant's plea, there it will be incumbent on the plaintiff to disprove the plea, though in so doing he may have to prove a negative. (*s*) As, in an action on a bond, if the defendant plead payment, and the bond appears to have been outstanding for twenty years, the law presumes that the principle debt has been discharged; this legal presumption of itself affords a defence, in support of the plea; and, to repel the presumption, it will be necessary for the plaintiff to produce evidence, from which the contrary presumption of non-payment may be inferred; such as evidence of payment of interest, or of an admission of the debt. (*t*) Where the question is on the legitimacy of a child, if a legal marriage is proved, the legitimacy is presumed, and the party, who asserts the illegitimacy, ought to prove it: (1)(*u*) but if there has been a divorce *a mensa et thoro*, the presumption is, that a child born afterwards (that is, beyond the time of gestation,) is illegitimate; (2) it will be sufficient, therefore, in such a case, to prove the divorce; and this will call upon the opposite party to establish the legitimacy by proof of access. (*v*)

Presumption of law.

Bond twenty years old.

Legitimacy.

Where the issue is upon the life or death of a person, the proof of the fact lies upon the party who asserts the death, for the presumption is, that the party continues alive, until the contrary be proved. (3)(*w*) But where no account can be given of the person this presumption of the duration of life ceases at the expiration of seven years from the time when he was last known to be living; (4)(*x*) a period, which has been fixed, from analogy to the statute of bigamy, (5) and the statute concerning leases determinable on lives. (6)* Thus, in the before-cited case of Doe v. Jesson,

Death presumed, after what time.

2 Bay, 476.

(1) See ante, p. 158.
(2) Parishes of St. George and St. Margaret, 1 Salk. 123.
(3) Throgmorton v. Walton, 2 Roll. Rep 461. Wilson v. Hodges, 2 East, 312.
(4) Doe, dem. George, v. Jesson, 6 East, 80, 85. Doe, dem. Lloyd v. Deakin, 4 Barn. & Ald. 434. Roe v. Hasland, 1 Chit. 454.
(5) St. 1 Jac. 1, c. 11, s. 2.
(6) St. 19 C. 2, c. 6.

* The statute of bigamy contains a proviso, that "it shall not extend to any person, whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent himself or herself, the one from the other, by the space of seven years together within the king's dominions, the one of them not knowing the other to be living within that time." It has been held, that the last clause (namely, "the one of them not know-

(*s*) See Note 376, p. 487. (*t*) See Note 377, p. 488. (*u*) See Note 378, p. 488. (*v*) See Note 379, p. 488. (*w*) See Note 380, p. 489. (*x*) See Note 381, p. 489.

where it was proved, that a person went to sea at a particular time, which was the last account given of him, his death was presumed at the end of seven years from that time. And therefore, where the defendant pleaded coverture in bar of an action of assumpsit, and proved her marriage, and that her husband went abroad twelve years before the commencement of the action, this was held not to be sufficient, and the defendant was required to prove that her husband was alive within seven years; (1) without such additional proof, the jury might have presumed the death of the husband at the time of the promise, which would have been against the defendant's plea. (*y*)

Plea of coverture.

Fact peculiarly within the knowledge of a party.

It is a general rule of evidence, that the burthen of proof lies on the person, who has to support his case by proof of a fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. (2) In an action by the assignees of a bankrupt, where the defendant, under a notice of set-off, gave in evidence promissory notes dated before the bankruptcy, the Court held that he ought also to show, that the notes came to his hands before that time. (3) In an action on the game laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified; yet it is not not necessary to disprove his qualifications; but it will be for the defendant, if he can, to prove himself qualified. (4) And it has lately been determined by the Court of King's Bench, that the same rule of evidence applies as well to proceedings on in-

Receipt of notes.

Qualification.

(1) Hopewell v. De Pinna, 2 Camp. 13. Doe, dem. Banning, v. Griffin, 15 East, 293, stated infra.

(2) 4 Barn. & Ald. 140, vid. infra, sect. 6. 9 Price, 257. 5 Maule & Selw. 211. 1 Barn. & Cress. 150. 3 Barn. & Cress 242.

(3) Dickson v. Evans, 1 T. R. 57. See other examples in criminal cases, in 2 East, P. C. 782.

(4) By Lord Mansfield, in Spieres v. Parker, 1 T. R. 144. Buller, J. in 1 T. R. 649 Heath, J. in Jelfs v. Ballard, 1 Boss. & Pull. 468. Chambre, J in Frontine v. Frost, 2 Bos & Pull. 307, adm. per Cur. in R. v. Stone, 1 East, 650.

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ing," &c.) relates only to the second clause, and not to the first respecting commorancy beyond the seas: and, consequently, that the second marriage is not felonious, where either of the parties is beyond the seas for seven years, though the party in this country had notice that the other was living. 3 Inst. 88. 1 Hal. P. C. 692. 4 Bl. Com. 164.

(*y*) See Note 382, p. 490.

formations before magistrates, as to actions for penalties; and that a conviction, which specifically negatives the several qualifications mentioned in the statute, is sufficient, without stating evidence to negative those qualifications. (1) If such negative evidence were necessary to support the information, it would scarcely be possible in any case to convict, in consequence of the great number of distinct heads of qualification, which are enumerated in the statute. On the other hand, all the qualifications specified are peculiarly within the knowledge of the qualified person. If he is entitled to any such estate as the statute requires, he may prove it by his title deeds, or by the receipt of the rents and profits; or if he is the son and heir apparent, or servant to any lord or lady of a manor, and appointed to kill game, that will be a good defence. All these qualifications are peculiarly within the knowledge of the party himself; but the prosecutor has probably no means of proving a disqualification. (*z*)

Although, in general, it is necessary for a party, who brings an action, to prove all the material facts, which he alleges in support of his claim, yet where the defendant pleads a fact within his own knowledge in discharge of himself, and the plaintiff still insists on the defendant's liability, alleging the same fact in his replication, there the burthen of the proof lies on the defendant, not upon the plaintiff. Thus, in an action of assumpsit, where the defendant pleaded infancy, and the plaintiff replied, that "the defendant, after he had attained his full age, ratified and confirmed the promise and undertaking," the Court held, that the mere proof of a promise to pay was sufficient on the part of the plaintiff; and that it was for the defendant to prove the personal incapacity to contract, on which he grounded his defence, and which lay so peculiarly within his own knowledge. (2) (*a*) Plea of infancy.

On a trial for bigamy, the register of the first marriage being produced, which stated the marriage to be by licence, without stating it to be by consent of parents or guardians, the prisoner in his defence proved, that he was an infant at the time of the marriage; Pros. for

(1) R. v. Turner, 5 Maule & Selw. 206.

(2) Borthwick v. Carruthers, 1 T. R. 648.

(*z*) See Note 383, p. 490. (*a*) See Note 384, p. 491.

and it was held, that the [illegible] on the part of the prosecution, to give some evidence of the consent required by the marriage act. (1) Any subsequent countenance given by the parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent. (2)(*b*)

Sect. V.

The Substance only of the Issue need be Proved.

The next general rule to be considered is, that on any issue it will be sufficient to prove the substance of the issue.

It is a general principle of evidence, that all the material facts in the declaration, which are put in issue, must be established by legal proof. (*c*) Another principle is, that the nature and extent of the proof will depend upon the manner in which the alleged facts are introduced; allegations, which are merely matters of inducements, do not require such strict proof as those which are precisely put in issue between the parties. (3) Evidence, as Lord Mansfield used frequently to observe, is always to be taken with reference to the subject matter to which it is applied, and to the person against whom it is used.

Inducement.

There are a great variety of examples, both in civil and criminal cases, which might be cited in illustration of the rule now under discussion. The object of the present section will be to make a selection of such examples as appear most generally useful. And, afterwards, it will not be foreign to the subject to consider the nature of material and immaterial averments, and the doctrine of variances.

Plea, *solvit ad diem.*

In an action on a bond, if the defendant plead *solvit ad diem*, the issue will be maintained by proof of payment *before* the appointed day; and payment to a third person by the appointment of the plaintiff, will be substantially payment to the plaintiff himself. (*d*)

(1) Butler's case, Russ. & Ry. Cr. C. 61.
(2) Ib. in note.
(3) By Chambre, J., in 1 New Rep. 219.

(*b*) See Note 385, p. 491. (*c*) See Note 386, p. 491. (*d*) See Note 387, p. 492.

In an action of waste, for cutting down a certain number of trees, proof that the defendant cut a smaller number is sufficient; for, in effect the issue is waste or no waste. (1) And in an action of covenant, when the breach assigned is, "that the defendant has not used a farm in a husbandlike manner, but on the contrary has committed waste," &c. to which the defendant pleads, "that he has not committed waste," &c., but used the farm in a good and husbandlike manner, and issue is taken upon this, the plaintiff cannot give evidence of any unhusbandlike treatment of the farm, not amounting to waste; for the issue is narrowed to this point. (2)

Waste. Covenant.

In an action against a sheriff, where the plaintiff declared, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and a special verdict was found, that the husband alone was taken in execution (the execution being for a debt due from the wife before coverture), and that he escaped, the Court held, that the substance of the issue was found, and gave judgment for the plaintiff. (3)

Action against sheriff.

In an action on a simple contract, whether assumpsit or debt, the plaintiff may prove and recover a less sum than he has demanded in the writ; and for this reason, it has been held, that a declaration in such action is not bad for specifying a less sum, though the breach assigned is the non-payment of the whole sum demanded. (4) (*e*)

Assumpsit.

In actions for slander, the courts used at one time to hold, that the plaintiff was bound to prove the words spoken precisely as laid; but it is now settled that it will be sufficient, if the plaintiff prove some material part of the words alleged on the record. If the declaration contain several actionable words, the plaintiff will be entitled to a verdict on proving some of them. (5) (*f*)

Action for slander.

In an action of replevin, where the defendant avowed taking the cattle as damage-feasant, the plaintiff pleaded in bar, that one

Replevin.

(1) Co. Litt. 282, a. 2 Roll. Abr. 706, tit. Verdict, C. 40. Hobart, 53.
(2) Harris v. Mantle, 3 T. R. 207.
(3) Roberts and wife v. Herbert, 1 Sid. 5, S. C. cited Bull. N. P. 299.
(4) M'Quillin v. Cox, 1 H. Bl. 249.
(5) Compagnon v. Martin, 2 Bl. Rep. 790. See vol. ii. Action for Slander.

(*e*) See Note 388, p. 493. (*f*) See Note 389, p. 494.

W. was seised of a house and land, &c., whereto he had common, &c., and demised the same to him to hold from a certain day next before for a year; the avowant traversed the lease *modo et forma*, upon which issue was taken; the jury found a special verdict, that W. made a lease to the plaintiff on the day stated, for a year; and the plaintiff had judgment, for although this is not the same lease as pleaded (since this begins on the day and the other not so soon), yet the Court said, the substance of the issue is, whether or not the plaintiff had such a lease, as by force thereof he might have common at the time, and this appeared to be the case here. (1)(*g*)

Action for assault.

Constable's district.

If the issue joined between the parties is, whether A. & B. were church-wardens, proof that one was, and not the other, would not be sufficient. (2) So, where the declaration averred, that the plaintiff was constable of a particular parish, and that he was assaulted in the execution of his office as constable, and it appeared on the evidence, that he had been sworn in to serve for a whole liberty, of which the parish formed a part, this was held to be a material variance. (3)

Plea of tender.

If the plaintiff reply, to a plea of tender, that, before the cause of action and after the tender, he demanded the sum tendered, he will be obliged to prove, under the issue joined upon this replication, a demand of that specific sum. The proof of a demand of a *larger* sum would not support the issue. (4)

Examples in criminal cases.

Pros. for libel.

The same general rule of evidence applies, if possible, still more strongly to the case of criminal prosecutions than to civil suits. It is an universal principle, which runs through the whole of the criminal law, that it will be sufficient to prove so much of the indictment, as charges the defendant with a substantive crime. If the indictment charges, that the defendant did, and caused to be done, a particular act, it is enough to prove either the one or the other. If the defendant is charged with composing, printing, and

(1) Pope v. Skinner, Hob. 72, S. C. cited Bull. N. P. 300. Forty v. Imber, 6 East, 434.
(2) Bull. N. P. 299.
(3) Goodes v. Wheatley, 1 Campb. 231.
(4) Rivers v. Griffiths, 5 Barn. & Ald. 630. Spybey v. Hide, 1 Campb. 181.

(*g*) See Note 330, p. 494.

publishing a libel, he may be convicted only of the printing and publishing. (1)

False pretences.

On an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged : proof of part of the pretence, and that the money was obtained by such part, is sufficient. (2) (*h*)

Petit treason.

On a charge of petit treason, if the killing with malice is proved, but no circumstances of aggravation are proved to make the offence treasonable, the prisoner may be found guilty of the murder. (3)

Burglary.

On an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night—

Robbery.

or on a charge of robbery, where the property was not taken from the person by violence, or by putting him in fear—the prisoner may be found guilty only of the simple larceny. (4)

Murder.

On the trial of an indictment for murder, the jury may find the prisoner guilty of manslaughter only; for the principal matter is the killing, and the malice is only a circumstance in aggravation. (5)

Manner of death.

And if the manner or means of the death, proved at the trial, agree in substance with the means charged in the indictment, it will be sufficient ; as, where the indictment is for killing with a dagger, and the evidence prove a killing with a staff; (6) or if the indictment be for killing with one sort of poison, and the evidence proves the killing with another ; such evidence maintains the indictment, because the proof of the instrument is not absolutely necessary to the proof of the fact itself; (6) but if the charge is for poisoning, and the death is proved to have been caused by striking or starving, &c., this evidence would not support the indictment, as the species of death in the one case is totally different from that in the other. (7)

(1) R. v. Hunt, 2 Campb. 583. R. v. Williams, ib 646. See also cases in 2 East, P. C. 515, 516.

(2) Hill's case, Russ. & Ry. Cr. C. 190.

(3) Case of Swan and Jefferys, Fost. Cr. L. 104.

(4) 2 East, P. C. 513, 515, 516.

(5) Mackalley's case, 9 Rep. 67, b. Co. Litt. 282, a. Gilb. Ev. 233.

(6) 9 Rep. 67, a. Gilb. Ev. 231. 1 East, P. C. 341. Rex v. Clark, 1 Brod. & Bing. 473.

(7) 9 Rep. 67, a. Gilb. Ev. 231. 1 East, P. C. 341. 2 Inst. 319.

(*h*) See Note 391, p. 495.

Principal.

If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. & C. were present, aiding, &c., this is not a material variance, for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had all together struck the deceased. (1) The identity of the person, supposed to have given the stroke, says Mr. Justice Foster, is but a circumstance, and in this case a very immaterial one. The stroke of one is, in consideration of law, and in sound reason too, the stroke of all. They are all principals in law, and principals in deed. (*i*)

Accessory.

If two persons are indicted as principals, and one is proved to be only accessory, he must be discharged on this indictment, (2) for in consideration of law their offences are quite different. (*j*) And one indicted as accessory before the fact cannot be convicted upon evidence proving him to have been (principal in the second degree) present, aiding and abetting, at the fact. (3)

Murder of officer in execution of his office.

In Mackalley's case, (4) where the prisoner was tried for the murder of a serjeant at mace in London, the indictment charged, that the sheriff made a precept to the serjeant for the arrest, and it appeared upon the evidence, that there was no such precept, but that the serjeant made the arrest *ex officio* at the plaintiff's request, on the entry of the plaint according to the custom of the city; and all the judges held, that the variance between the indictment and the evidence was not material, because the warrant to arrest was only a circumstance, and the substance of the matter had been found, which was, that the prisoner killed an officer in the lawful execution of legal process. (*k*) The Judges were also of opinion, that the indictment might have been general, (that the prisoner feloniously and of his malice prepense killed, &c.) and that the special matter might have been given in evidence; and since the indictment in the principal case contained such an averment, they held that the

(1) Mackalley's case, 9 Rep. 67, p. 1 Plowd. 98. Willis' case, 1 Salk. 334. Fost. Disc. 351. Towle's case, on st. 43 G. 3. c 58. 3 Price, 145. 2 Marsh. 466, S. C.

(2) Gilb. Ev. 232. See Fost. Cr. L. 361.

(3) Gordon's case, 1 East, P. C. 352.

(4) 9 Rep. 61, b. 67, a. 68, a.

(*i*) See Note 392, p. 496. (*j*) See Note 393, p. 496. (*k*) See Note 394, p. 496.

charge of murder had been proved, notwithstanding that the special matter, given in evidence, might vary in substance from the special matter contained in the indictment. (*l*) Variance.

A great variety of cases occurs in the books with respect to the necessity of proving averments in pleading. Immaterial averments need not be proved. It is a general rule, that a variance between the allegation and the proof will not defeat a party, unless it be in respect of matter which, if pleaded, would be material. (1) If the variance be in respect of a matter not essential to maintain the action or the plea, it is of no importance. In an action upon a bill of exchange, when the declaration stated the bill to have been excepted and indorsed *before* it became due, and the proof was, that it was indorsed *after* it became due, the Court held it was no variance; because it was immaterial, whether the bill was indorsed before or after it became due; and therefore it was unnecessary to prove the indorsement precisely at the time when it was alleged. (2) (*m*) Averments material. Variance.

The general rule of pleading in cases of tort is, that it is sufficient, if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved. There is one exception, however, to this rule, which is, when the allegation contains matter of description. There, if the proof given be different from the statement, the variance is fatal. (3) In tort.

It is quite enough in cases of tort, if the same ground of action is proved as is laid in the declaration, although not to the extent there stated. In the cases of contract and prescription, it is different, for in the former, if all that is stated in the declaration be not proved, it is a proof of a different contract, and a different ground of action; the party therefore cannot be entitled to the judgment of the court. In the latter case, when a pre- In contract or prescription.

(1) 3 Barn. & Cress. 122, by Lord Tenterden, Ch. J.
(2) Young v. Wright, 1 Campb. 139.
(3) 2 Barn. & Ald. 363, by Lord Tenterden. 4 Barn. & Cress. 385.

(*l*) See Note 395, p. 497. (*m*) See Note 396, p. 501.

Variance.

scription is alleged in bar, it is an entire thing, and must be proved to the extent laid. (1)

Inducement.

An averment, which is merely matter of inducement to the action, need not be proved with the utmost strictness and precision. Thus where an action was brought to recover double the value of goods, which had been removed for the purpose of preventing a distress, and the declaration stated a certain sum to be in arrear for rent, it was decided that the plaintiff was entitled to recover, although the notice of distress was for a less sum. (2) Here, whether the particular sum stated in the declaration was in arrear, must be perfectly immaterial; the damages were not to be measured by the quantity of rent, but by the value of the goods, which had been removed. (*n*)

Where averment may be struck out.

If an averment may be struck out without destroying the plaintiff's right of action, it will not be necessary to prove it; but it is otherwise, if the averment cannot be struck out without getting rid of a part essential to a cause of action: for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover. (3) Thus, in the case of Bristow v. Wright, (4) which was an action against the sheriff for taking the goods of a lodger without leaving a year's rent, the declaration stated some particulars of the demise relative to the time of payment of rent, which were negatived by the evidence, and the Court held that the variance was fatal. There, it was necessary for the plaintiff, in order to show that he was landlord, to set forth a contract between himself and the tenant, and no part of the contract alleged could be struck out, because it was in its nature entire; though it was admitted, that the part of the contract, relating to the time of payment, need not have been averred. (*o*)

The case of Williamson v. Allison (5) illustrates the other part of the rule, namely, that where an averment may be struck

(1) 2 Barn. & Ald. 366.
(2) Gwinnet v. Phillips, 3 T. R. 643. See another instance in Stoddart v. Palmer, 3 Barn & Cress. 2, stated infra.
(3) By Lawrence, J. in Williamson v. Allison, 11 East, 452.
(4) 2 Doug. 664. See 5 T. R. 496. 2 East, 450, 452. 8 East, 9.
(5) 2 East, 446. See also Peppin v. Solomon, 5 T. R. 496. Broomfield v. Jones, 4 Barn. & Cress. 380.

(*n*) See Note 397, p. 501. (*o*) See Note 398, p. 503.

out, it need not be proved. That was an action on the case in tort, for the breach of a warranty in selling goods unfit for sale, and the declaration averred, that the defendant knew the goods to be in an unfit state, of which fact there was no evidence at the trial; but the Court held, that such proof was unnecessary, for if the whole averment respecting the defendant's knowledge of the unfitness for sale were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. (*p*) Variance in contract.

The same rule is applicable to averments in an indictment. If an averment may be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence. Thus where the prisoner was charged with robbery near the highway, and the robbery was proved, but not near the highway, (1)—where the robbery was averred to have been committed in the house of a certain person named, and the name of the owner was not proved, (2)—and where the offence of arson was stated in the indictment to have been committed in the night-time, and was proved not to have been in the night-time, (3)—in these cases, all the Judges were of opinion, that the convictions were proper, and the prisoners were ousted of the benefit of clergy. But where the averment in the indictment is sensible and material, it ought to be regularly proved; as, where the prisoner was indicted for a burglary in the house of J. D. with intent to steal the goods of J. W., and it appeared in evidence that no such person had any goods in the house, but that the name of J. W. was put by mistake for J. D., (4) the Judges held, that it was material to state truly the property of the goods, and on account of this variance the prisoner was acquitted. (*q*) Indictment. Robbery. Arson. Burglary.

Where the action is brought upon a contract, the contract ought to be stated correctly, and proved as laid; and if any part of the contract proved, vary materially from that stated in the Variance in contract.

(1) Wardle's case. 2 East, P. C. 785. Russ. & Ry. Cr. C. 9, S. C.
(2) Pye's case, Johnstone's case, 2 East, P. C. 785. Russ. & Ry. Cr. C. 9, S. C.
(3) Minton's case, 2 East, P. C. 1021.
(4) Jenk's case, 2 East, P. C. 514.

(*p*) See Note 399, p. 505. (*q*) See Note 400, p. 503.

Variance in contract.

pleadings, the whole foundation of the action fails, since the contract is entire and indivisible. (1) If the contract, therefore, for the breach of which the action is brought, was in the alternative, at the option of the defendant, (as to deliver *this* or *that* quantity of goods at one time, and the remainder at another,) it ought to be so stated, for if the declaration states an absolute contract, and the proof is of a contract in the alternative, the plaintiff cannot recover, although the defendant may have determined his option. (2) In an action against a carrier, on a general undertaking to carry safely, proof of a contract, to carry safely, (fire and robbery excepted,) is a variance. (3) (*r*)

Contract stated in action of tort.

This rule is not confined to actions of assumpsit. In an action of tort also, where the contract is necessary to be stated in order to maintain the ground of action as laid in the record, the contract ought to be proved as stated. Thus in an action against two defendants for deceit, charged in the declaration to have been committed by them in a joint sale of their joint property, the Court of King's Bench held, as there was no evidence against one of the defendants, that the action could not be maintained against the other. (4) The joint contract here described, said Lord Ellenborough, in delivering the judgment of the Court, is the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity; and it is a rule of law, that the proof of the contract must correspond with the description of it in all material respects. (*s*)

(1) 1 T. R. 240; 3 T. R. 645. The following are the principal modern cases on this subject; Bristow v. Wright, 2 Doug, 664, (supra, p. 206, S. C.) Carlisle v. Trears, Cowp. 671. Churchill v. Wilkins, 1 T. R. 447. Durston v. Tuthan, cited 3 T. R. 67. Littler v. Holland, 3 T. R. 590. Hockin v. Cooke, 4 T. R. 414. Leery v. Goodson, 4 T. R. 687. White v. Wilson, 2 Bos. & Pull. 116 Penny v. Porter, 2 East, 2. Brown v. Sayce, 4 Taunton, 320. Pool v. Court, 4 Taunton, 700. Cohen v. Hannam, 5 Taunton, 101. Arnfield v. Bate, 3 Maule & Sel. 173 Squire v. Hunt, 3 Price, 68. Wildman v. Glossop, 1 Barn. & Ald. 9. Tucker v. Cracklin, 2 Starkie, N. P. C. 385. Parker v. Palmer, 4 Barn. & Ald. 387. Strong v. Rule, 3 Bing. 315.—The following are cases on promissory notes and bills of exchange. Whitwell v. Bennet, 3 Bos. & Pull. 559. Gordon v. Austin, 4 T. R. 611. Johnson v. Mars, 2 Camp. 303. Roche v. Campbell, 3 Campb. 247. Hodge v. Fillis, 3 Campb. 463. Hutchinson v. Piper, 4 Taunton, 810. Exon v. Russell, 4 Maule & Sel. 505. Mountstephen v. Brooke, 1 Barn. & Ald. 224.

(2) Penny v. Porter, 2 East, 2; and see 2 East, 134; Cooke v. Munstone, 1 Bos. & Pull. N. R. 351.

(3) Latham v. Rutley, 2 Barn. & Cress. 20.

(4) Weall v. King, 12 East, 452 Green v. Greenbank, 2 Marsh. 485. Lopes v. De Tastet, 1 Brod. & Bing. 538.

(*r*) See Note 401, p. 509. (*s*) See Note 402, p. 514.

Variance in contract.

What parts of contract need be stated.

It will not be necessary for the plaintiff to state all the several parts of a contract, which consists of distinct and collateral provisions; but it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration, including the time, manner and other circumstances of its performance. (1) Thus, if there is a provision in the contract to discharge the party from all liability, in case a particular condition is not complied with, it ought to be set out and strictly proved: but it is otherwise, where the provision respects only the liquidation of damages on a breach of the contract; such a provision need not be stated in the pleadings. (1) In an action on the case upon the warranty of a horse, if the plaintiff states truly the whole of the consideration for the promise of the defendant, (which, in the case referred to, was the re-delivery of the horse to the defendant,) and then states truly the substantive parts of the warranty, of the breach of which he complains, this will be sufficient, without averring other parts of the warranty entirely collateral and irrelevant to those stated. (2) In the case of Gladstone v. Neale, (3) the contract stated for the purchase of a certain quantity of goods, ("to wit, eight tons," and the contract proved was for the purchase of "*about* 8 tons," the exact amount not being known at the time of making the contract, but being ascertained before the action was brought; and it was determined at the trial, and afterwards by the court of King's Bench, that the variance was not material. (*t*)

Joint contracts.

Rule as to party *sued*.

In all cases of joint contracts, in writing or by parol, or *ex quasi contractu*, and in all cases of joint obligation, it seems now to be settled, that if one only be sued, he may plead the matter in abatement, but cannot take advantage of it afterwards upon any other plea, or in arrest of judgment, or give it in evidence under the general issue. Thus, in an action against the defendant as drawer of a bill of exchange, who pleaded non assumpsit, and it appeared in evidence at the trial, that the bill was drawn by the defendant and

(1) Clarke v. Gray, 6 East, 564, 569. Thornton v. Jones, 2 Marsh. Rep. 287. Parker v. Palmer, 4 Barn. & Ald. 387.

(2) Miles v. Sheward, 8 East, 7. Cotterill v. Cuff, 4 Taunt. 285. Squier v. Hunt, 3 Price, 68. Hanford v Palmer, 2 Brod. & Bing. 359. See Blyth v. Bampton, 3 Bing. 472.

(3) 13 East, 410. Crispin v. Williamson, 8 Taunt. 107.

(*t*) See Note 403, p. 515.

Variance in contract.

another jointly; on a motion to set aside the verdict (which had been found for the plaintiff,) upon the ground of this supposed variance, the court of exchequer was clearly of opinion, that there was no variance between the bill of exchange proved, and that which was declared upon. (1) The same rule holds, when the action is brought against one of several partners; the defendant must plead in abatement, and cannot give the partnership in evidence under the general issue. (2) Formerly, a different rule was adopted, on the ground of a supposed variance. (3) But with respect to the party suing, the rule is still the same; namely, that if an action of assumpsit is brought by one only of several parties to a contract, who ought to join, the defendant may take advantage of it upon the general issue of non assumpsit. (4) (*u*)

Rule as to party *suing*.

Rule as to joinder in torts.

A distinction, however, has been made, in this respect, between actions of assumpsit and actions of tort; and, in the latter case, if one only of several persons, who ought to join, bring the action, the defendant cannot avail himself of the variance under the general issue, but must plead it in abatement. (5) There is a distinction also between these forms of action, with respect to the party sued. For if several persons jointly commit a tort, the plaintiff has his election to sue all or any number of the parties, a tort being in its nature the separate act of each individual; and, therefore, in actions *ex delicto* against one only, (such as trover, trespass, case for malfeasance, and the like,) for a tort committed by several, the defendant cannot plead such matter in abatement or in bar, nor give it in evidence on the general issue. (6) (*v*)

Variance in prescription.

The rule above laid down with respect to contracts applies equally to the case of a prescription: a prescriptive right is one

(1) Evans v. Lewis, MS. case reported in Mr. Serjt. Williams' edit. of Saund. 1 V. 291, d. Germain v. Frederick, MS. case, ib. Rees v. Abbott, Cowp. 832. Powell v. Layton, 2 New Rep. 365.

(2) Rice v. Shute, 5 Burr. 2611. Abbott v. Smith, 2 Black. 947. 1 Bos. & Pul. 72.

(3) Boson v. Sandford, 2 Salk. 440.

(4) Leglise v. Champante, 2 Str. 820. Graham v. Robertson, 2 T. R. 282. 1 Saund. 291, *f.* in note. Teed v. Elworthy, 14 East, 210.

(5) Dockwray v Dickenson, Skin. 640 Leglise v. Champante, 2 Str. 820. Addison v. Overend, 6 T. R. 766. Sidgworth v. Overend, 7 T. R. 279. Bloxham v. Hubbard, 5 East, 420.

(6) Boson v. Sandford, 1 Show. 29. Mitchell v. Tarbutt, 5 T. R. 651.

(*u*) See Note 404, p. 515. (*v*) See Note 405, p. 517.

entire thing, and, when put in issue, must be proved as stated. It ought to be proved, therefore, to the full extent, to which it is claimed. Thus, in replevin, if the defendant avow taking the cattle as damage feasant, and the plaintiff plead in bar a right of common, and aver that the cattle were levant and couchant, on which averment issue is joined, proof only for part of the cattle will not be sufficient, for the issue is upon the whole. (1) But though the party must prove a prescriptive right commensurate with the right claimed, he will not be precluded from recovering, because he proves a more ample right than what he claims. Evidence of a right of common for sheep and cows will support a plea prescribing for common only for sheep. (2)

Variance in deed.

Proof of more ample right.

A distinction is to be made between the case of a prescriptive right of common alleged in bar, on which issue is taken, and a possessory right of common claimed in an action of tort for disturbance of the right. In the latter case, it is sufficient to prove the same ground of action as is laid in the declaration, although not to the extent there stated. If the allegation is, that the plaintiff was entitled to the right of common in respect of a certain quantity of land, and the proof is in respect of a part only of that land, it will be sufficient;(3) so if it is claimed in respect of a messuage and a certain number of acres of land, and proved to be in respect only of land. (4) The proof, in these cases, is not of a different allegation, but of the same allegation in part; and that is sufficient. (5)(*w*)

Plea in bar.

Action for disturbance.

Where a deed is declared upon, and it appears, on comparing and reading the record with the instrument produced, that some of the words, stated in the pleadings as descriptive of the deed, (and which cannot be rejected as surplusage, vary from the

Variance in proof of deed.

Description.

(1) Sloper v. Allen, 2 Roll. Ab. 706, tit. Trial, c. 41, S. C. cited Bull. N. P. 299. Gray's case, 5 Rep. 79. Down's case, 4 Rep. 29, b. Rogers v. Allen, 1 Campb. 313. See Brook v. Willett, 2 H. Black. 224.

(2) Bushwood v. Bond. Cro. Eliz. 722. Bailiff, &c. of Tewksbury v. Bricknell, 1 Taunt. 142. West v. Andrews, 6 Barn. & Ald. 77.

(3) Yarley v. Turnock, Cro. Jac. 629. Palmer, 269, S. C. 2 Barn. & Ald. 366.

(4) Ricketts v. Salwey, 2 Barn. & Ald. 360. Manifold v. Pennington, 4 Barn. & Cress. 161.

(5) 2 Barn. & Ald. 366.

(*w*) See Note 406, p. 518.

Variance in records.

deed, the variance will be fatal ; (1) and though some parts of the deed, which the declaration purports to set out at length, need not have been stated at all, or might have been stated shortly, according to their legal effect and operation, (2) yet, if they are set out at length and descriptive of the deed, they ought to be proved as laid, and in case of a variance the plaintiff will fail. A qualified covenant ought to be stated with all its qualifications ; if it is set out in the declaration as a general covenant, and on reading the deed in evidence it appears to be subject to an exception or limitation, the variance will be fatal. (3)

Deed stated in substance.

If the declaration does not profess to describe a deed or to set it out according to its tenor, but states it correctly in substance and in its legal effect, a variance will be immaterial. In an action against a tenant for breach of covenant, proof of a lease from the plaintiff and his wife to the defendant will support an averment of a lease from the plaintiff alone, at least, where the wife had only a chattel interest in the lands before marriage, or they are the property of the husband ; for the covenants made to husband and wife may, in legal effect, be deemed covenants made to the husband alone. (4) So bonds and promissory notes, given to the wife, may be declared upon, as having been given to the husband, in a suit by him. (5)

Variance in proof of record.

A similar rule has been laid down, where a record is referred to in the pleadings. Whatever may have been the rule upon this subject in ancient times, a distinction is now established between allegations of matter of substance, and allegations of matter

(1) The following are the principal modern cases on this subject :—Sands v. Ledger, 2 Ld. Raym. 792. Pitt v. Green, 9 East, 188. Bowditch v. Mawley, 1 Campb. 195. Howell v. Richards, 11 East, 633. Waugh v. Russell, 5 Taunt. 707. Tempany v. Bernard, 4 Campb. 20. Morgan v. Edwards, 2 Marshall, 96. Hoar v. Mill, 4 Maule & Selw. 470. Weeks v. Maillardet, 14 East, 568. Gordon v. Gordon, 1 Starkie, N. P. C. 294. Horsefall v. Testar, 7 Taunt. 385. Cartridge v. Griffiths, 1 Barn. & Ald. 57. Swallow v. Beaumont, 2 Barn. & Ald. 765. Brown v. Knill, 2 Brod. & Bing. 395. Arnold v. Revoult, 1 Brod. & Bing. 443.

(2) Dundas v. Lord Weymouth, Cowp. 665. Price v. Fletcher, Cowp. 727. Roulston v. Clarke, 2 H. Bl. 663.

(3) Howell v. Richards, 11 East, 633. Tempany v. Bernard, 4 Campb. 20.

(4) Arnold v. Rivoult, 1 Brod. & Bing. 442. Beaver. v. Lane, 2 Mod. 217, S. P.

(5) 1 B. & B. 442. Antrenlein v. Clarke, 4 T. R. 616. In this case the bond was given to the husband and wife as administratrix.

of description. The former require to be substantially proved: the latter must be literally proved. (1)

Variance in record.

If the allegation is descriptive of the record, it ought to be strictly and literally proved, as laid. Thus, in the case of Green v. Rennett, (2), where a writ was described in terms, when sued out and when returnable, and, on the production of the writ itself, it appeared to be returnable on a different day from that stated in the declaration, the Court held that the variance was fatal, though the day of the return was laid under a videlicet.* In this case the return-day was material, because it was a part of the description of the writ stated, which could only be proved by a writ returnable on the same day.

Allegations of *descriptions.*

But where the pleadings do not undertake to set out the tenor of the record, and the substance only of the record is stated, there a variance between the allegation and the record will not be fatal, provided the allegation is substantially proved. Thus in the case of the King v. Lockup, on a prosecution for perjury, where the objection was, that the indictment stated a bill in Chancery to be directed to Robert Lord Henley, &c., and it appeared in evidence to have been directed to Sir Robert Hen-

Allegations of *substance.*

Direction of bill.

(1) By Abbott C. J., 3 Barn. & Cress. 4.

(2) 1 T. R. 656. 9 East. 161, 163. Brown v. Jacobs, 2 Esp. N. P. C. 726. R. v. Taylor, 1 Campb. 404. See also Com. Dig. tit. Record, (C), (D). R. v. Leefe, 2 Campb. 141. Woodford v. Ashley, 2 Campb. 193. R. v. Bellamy, 1 Ry. & Mo. 171. Sheldon v. Whitaker, 1 Ry. & Mo. 266. Bevan v. Jones, 4 Barn. & Cress. 403. Edwards v. Lucas, 5 Barn. & Cress. 339.

* Where the circumstance averred in the pleadings (as of a particular sum or day) is material, the addition of a *videlicet* will not render the averment immaterial, (Grimwood v. Barrit, 6 T. R 460, 463;) though the omission of a *videlicet* may in some cases make an averment material, which, if a *videlicet* had been inserted, would not have been so. (Symmons v. Knox, 3 T. R. 65, 68. Crispin v. Williamson, 8 Taunt. 112.) If therefore the day, laid in the declaration, be material, it must be proved, notwithstanding that it is laid under a *videlicet*. It is by no means generally true, that the omission of a *videlicet* will make it necessary to prove the particular sum or day, &c. strictly as laid. Some cases have been already mentioned, where a variance in the proof of such circumstances has been adjudged to be immaterial. It will be sufficient to add one other example. On an indictment for stealing goods in a dwelling-house, under the statute of 12 Ann. st. 1, c. 7, it is not necessary to prove, that the goods were of greater value than 40*s.*, though that should be averred in the indictment without a *videlicet*. And see R. v. Burdet, 1 Ld. Raym. 149. R. v. Gilham, 6 T. R. 265. Gwinnett v. Philips, 3 T. R. 643, and 2 Campb. 231.

Effect of *videlicet.*

Variance in time.

ley, Knight, &c., the Court overruled the objection, and held it to be sufficient, that the complainant had preferred a bill before the person who held the great seal, by whichever title he was styled. (1)

Date of acquittal.

So in the late case of Purcell v. Macnamara, (2) in an action for a malicious prosecution, where the allegation was, that the defendant prosecuted an indictment against the plaintiff, until afterwards, to wit, on a certain day named, the plaintiff was in due manner acquited, &c.; and, to prove this allegation, the record of acquittal was produced, which showed that the acquittal was on another day, the Court held that the variance was not material, and that the averment had been substantially proved. Here the day was not alleged as part of the description of the record; but the substance of the allegation was, that the plaintiff had been acquitted on the prosecution.

Date of judgment.

So in an action against a sheriff for a false return, the declaration stated, that the plaintiff in a certain term, (naming the term and the year) by judgment recovered, "as appears by the record," and the proof was that he recovered by a judgment of another term and a different year: the Court held that this was not a variance; that the averment, "as appears by the record," was mere surplusage, and might be rejected, inasmuch as the judgment was not the foundation of the action, but only inducement to it. (3)(*x*)

Variance in time.

It is a rule in pleading, that every material fact which is issuable and triable, must be averred to have happened at a certain time and place. (3) However, it will not generally be necessary to prove the time precisely as laid, unless that particular time is material. This is the constant course of proceeding in criminal prosecutions from the highest offence to the lowest. In high treason, evidence may be given of an overt act either before or

Indictment.

(1) R. v. Lockup, cit. 1 T. R. 240. 9 East, 163. R. v. Pippet, 1 T. R. 235. R. v. Payne, cit. 9 East, 158 R. v. Leefe, 2 Campb. 139. Byne v. Moore, 5 Taunt. 187. Cousins v. Brown, 1 Ry. & Mo. 291.

(2) 9 East, 157. Philips v. Bacon, 9 East, 298. Philips v. Shaw, 4 Barn. & Ald. 435.

(3) Stoddart v. Palmer, 3 Barn. & Cress. 2. In this case, an opinion of Lord Ellenborough in Purcell v. Macnamara was overruled.

(4) 5 T. R. 620.

(*x*) See Note 407, p. 518.

after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. Objections of this kind, on behalf of the prisoner, have been repeatedly overruled. (1) (*y*) Variance in place.

The same general rule applies, with as much reason, to civil suits. Thus, in an action on a promissory note, where the declaration states that the defendant on such a day made, &c., proof that he made his promissory note on a different day would be sufficient. (*z*) So in an action for assault, battery, taking of goods, &c., where the defendant pleads the general issue, the plaintiff will not be confined to the day stated in the declaration, but may prove the assault, &c., on any other day before the commencement of the action. (2) If the defendant justifies by *son assault* on the same day, and the plaintiff traverses the cause of justification, and at the trial the defendant proves the trespass on the same day, there the plaintiff cannot give evidence of an assault on another day. (3) And though the defendant should prove the assault of the plaintiff on another day, yet the plaintiff, after having made such a traverse, cannot prove another assault on a different day. (4) (*a*) Action. Son assault demesne.

The same certainty of description, as to the place or parish, is not so necessary in transitory as in local actions. In an action for non-residence, where the parish was described as *St. Ethelburg*, and proved to be *St. Ethelburga*, it has been held, that the variance was fatal; (5) so also it was, in an action of ejectment, where the premises were described as situate in the *united parishes of A. and B.*, but were proved to be in *the parish of A.*, and the two parishes were united only for the single purpose of maintaining the poor. (6) Where the premises were described as being in the parish of *St. George the Martyr*, *Bloomsbury*, and Variance in place. Material.

(1) Lord Balmarino's case; Lord Cilmarnock's case; Townley's case; State Trials. Fost. 8.

(2) Co. Lit. 282, a, b. 2 Roll. Ab. 687, 789, tit. Verdict, (N). Com. Dig. tit. Pleader, (S. 12.)

(3) Downes v, Skrymsher, Brownl. 233. 2 Roll. Ab. 687, l. 30, S. C.

(4) 2 Roll. Ab. 680, tit. Evidence, (C), Art. 3. Thornton v. Lysler. Cro. Car. 514, contra, (Jones J. doubting,) Roll. Ab. Ib. See 2 Saund. 5, note 3.

(5) Wilson q. t. v. Gilbert, 2 Bos. & Pul. 281.

(6) Goodtitle dem. Pinset v. Lammiman, 2 Campb. 274.

(*y*) See Note 408, p. 533. (*z*) See Note 409, p. 533. (*a*) See Note 410, p. 533.

Variance in place.

were proved to be in the parish of *St. George, Bloomsbury*, the variance was held to be fatal. (1)

Immaterial.

But where the premises were described as lying in the parish of *A. & B.*, and it appeared in evidence that part lay in A., and part in B., and that there was no such parish as *the parish of A. and B.*, the Court held, that the word *parish* was mere surplusage, and that the plaintiff was entitled to recover the lands in B. as well as in A. (2) So where the premises were laid to be in the parish of *Farnham*, and were proved to be in the parish of *Farnham Royal*, but it did not appear that there were two *Farnhams*, the Court held that the variance was immaterial. (3) But if there had appeared to be another *Farnham*, there would have been an uncertainty. (4)

Name of repute.

In an action for use and occupation, where the premises were proved to lie in the parish of *St. Mary, Lambeth*, but were described in the declaration as in the parish of *Lambeth*, which last was the name generally known, the variance was held to be immaterial, (5) and this has overruled an older case, where a variance between the parish of *Chelsae*, and the parish of *St. Luke's, Chelsae*, was held at nisi prius to be fatal. (6) Although it is not necessary, in this action, to describe where the premises lie, (7) yet if they are described in the declaration as situate in a certain parish, and are proved to be in a different parish, the plaintiff cannot recover. (8)

Matter of venue.

Where the parish or place mentioned is a mere matter of venue, and not of local description, (as, in an action for a nuisance defamatory to the plaintiff's character, where the declaration stated, that the defendant erected the nuisance, complained of, in *the parish of A.*, in a street adjoining to the plaintiff's house, &c.)

(1) Harris v. Cooke, 8 Taunt. 539.
(2) Goodtitle dem. Bremridge v. Walter, 4 Taunt. 671. See Sir C. Morgan v. Edwards, 6 Taunt. 394. The case of Wilson v. Clerk, therefore, (1 Esp. N. P. C. 273,) seems doubtful.
(3) Doe dem. Tollett v. Salter, 13 East, 9. R. v. Glossop, 4 Barn. & Ald. 619. Taylor v. Hooman, 1 Moore, C. P. 161.
(4) Taylor v. Hooman, Holt, N. P. C. 523.
(5) Kirtland v. Pounsett, 1 Taunt. 570.
(6) And see 3 Taunt. 140.
(7) King v. Fraser, 6 East, 348.
(8) Guest v. Caumont, 3 Campb. 235. 6 East, 352.

the actual situation of the house is immaterial, and the plaintiff may recover, though it should be proved that there is no such parish. (1) (*b*)

Variance in place.

On the trial of an indictment, it will be sufficient to show, that the offence was committed in some place within the county or other division. Mr. Sergt. Hawkins says, (2) it seems to be agreed, that this mistake of the place, in which an offence is laid, will not be material upon the evidence, on the plea of not guilty, if the fact be proved at some other place in the same county. Even if there should appear to be no such parish, as that laid, in the county, it has been doubted whether the indictment would be bad. (3) (*c*)

Rule in indictments.

By a recent statute, it is wisely provided (4) that no judgment upon any indictment or information shall be stayed or reversed for want of the averment of any matter that is unnecessary to be proved, or because any person is misdescribed in the pleadings in respect of his office or other descriptive appellation, or on account of the omitting to state the time of committing the offence where time is not of the essence of the offence, or for stating the time imperfectly, or for stating the offence to have been committed subsequent to the time of the finding of the indictment or the exhibiting of the information, or on an impossible day, or a day that never happened; nor shall it be stayed or reversed for want of a proper or perfect venue, when the Court shall appear to have had jurisdiction over the offence. (*e*)

Judgment not to be reversed, in certain cases.

Sect. VI.

The best Evidence is to be Produced, which the Nature of the Case admits.

The next general rule is, that the best evidence must be given, of which the nature of the thing is capable. (5)

(1) Jefferies v. Duncombe, 11 East, 226; 2 Camph. 3, S. C. For other examples, see Drewry v. Twiss, 4 Term Rep 553 Frith v. Gray, ib 561 Camp. of Mersey & Irwell Nav. v. Douglas, 2 East, 497. Hamer v. Raymond, 5 Taunt. 789.

(2) B. 2, ch. 25, s. 84. R. v. Dowling, 1 Ry. & Mo. 433.

(3) R. v. Dowling, 1 Ry. & Mo. 433. And see 3 Camph. 75 But see also 9 H. 5, st. 1, c 1; and Burn's Just 24th ed. p. 55, MS case.

(4) 7 G. 4, c. 64, s. 20.

(5) Gilb. Ev. 13. Bull. N. P. 295.

(*b*) See Note 411, p. 536. (*c*) See Note 412, p. 538. (*e*) See Note 413, p. 539.

Principle of the rule.

The true meaning of this rule is, not that courts of law require the strongest possible assurance of the matter in question, but that no evidence shall be given, which from the nature of the thing supposes still greater evidence behind in the party's possession or power; for such evidence is altogether insufficient, and proves nothing, but carries with it a presumption contrary to the intention for which it is produced. (1) Thus, if a party offer a copy of a deed or will, where he ought to produce the original, this raises a presumption, that there is something in the deed or will, which, if produced, would make against the party; and therefore the copy in such a case is not evidence. But if he prove the original deed or will to be in the hands of the adverse party, who refuses to produce it, although he has received a regular notice for that purpose,—or if he prove, that the original has been lost or destroyed without his default,—no such presumption can reasonably be made, and a copy will be admitted, because such a copy is the best evidence that can be produced. (2) (*f*)

Deed.

Will.

Proof of insurance.

On the trial of a person charged with having wilfully, and with intent to injure an assurance company, set fire to a house, which he had insured at the company's office, it would not be allowable to prove the insurance by means of an entry in the company's books, unless in the first instance a regular notice has been given to the prisoner to produce the policy at the trial; (3) but, if such notice has been given, then the entry in the insurance books would be admissible. So if it should be material for a plaintiff, in reply to the case of the defendant, to prove the contents of a registered deed, which is in the defendant's possession, the memorial of the deed, or other secondary evidence, would not be admissible for that purpose, unless there has been previously a notice to the defendant to produce the original. (4)

Registered deed.

(1) Gilb. Ev. 13.

(2) Gilb. Ev. 13. Bull. 323. Garnons v. Swift, 1 Taunt. 507, stated infra. Henry v. Leigh, 3 Campb. 499, stated infra. See also, infra, part 2, ch. 8 sect 2, as to the admissibility of secondary evidence in the case of written instruments; and as to the cases, in which a notice to produce writings may be dispensed with.

(3) R. v. Doran, 1 Esp. N. P. C. 127.

(4) Molton q. t. v. Harris, 2 Esp. N. P. C. 548.

(*f*) See Note 414, p. 540.

Licence to trade.

Parol evidence is not admissible to prove the contents of a licence to trade granted from the crown, though the licence is lost, because there must be some register of it at the secretary of state's office, and that register would be better than parol evidence.(1) Nor is parol evidence admissible to prove the taking of the oaths required by the toleration act: as the fact would be regularly entered on the records of the court, in which the oaths are supposed to have been taken. (2) (*g*)

Taking of oaths.

Discharge of insolvent.

The discharge of a defendant, by a court of quarter sessions, under an insolvent debtor's act, cannot be proved by parol evidence, nor by proof of an acknowledgment of the discharge by the plaintiff himself; for the discharge may have been irregular and void, or may have been mistaken by the plaintiff: a judicial act of this kind should be proved by calling the clerk of the peace, and giving in evidence the judgment or adjudication of the court for the debtor's discharge. (3) (*h*)

The general rule, now under consideration, is strongly illustrated by the case of Williams v. The East India Company, (4) where the question was, whether the defendants had put on board the plaintiff's ship some articles of a combustible and dangerous kind, without giving due notice of their nature to the master of the ship, or to any other person employed in its navigation? It appeared in evidence at the trial, that the goods were delivered by the officer of the defendants, with a written order to the plaintiff to receive them, in which order nothing was said as to their nature; that they were received by the chief mate of the plaintiff's ship, who had since died; and that no other person was present at the time of the delivery. It was further proved, by the captain of the ship and the second mate, that no communication had been made to either of them, nor, as far as they knew, to any other person on board. Upon this evidence the plaintiff, who had to prove the negative,

(1) Rhind v. Wilkinson, 2 Taunt. 237. Eyre v. Palsgrave, 2 Campb. 605.

(2) R. v. Hube, Peake, N. P. C. 131.

(3) Scott v. Clare, 3 Campb. 236, by Lord Ellenborough. Action of assumpsit; the general issue pleaded; the defence was, that the plaintiff had been so discharged after the cause of action had accrued, and before the commencement of the suit.

(4) 3 East, 193, 201.

(*g*) See Note 415, p. 542. (*h*) See Note 416, p. 544.

was nonsuited, on the ground, that he had not given the best evidence of the want of notice, which it was in his power to produce, by calling the company's officer, who delivered the articles on board. And the nonsuit was afterwards affirmed by the Court of King's Bench. "The best evidence," said Lord Ellenborough, in delivering the opinion of the Court, "should have been given, of which the nature of the case was capable. The best evidence was to have been had, by calling, in the first instance, upon the persons immediately and officially employed in the delivering and in the receiving of the goods on board, who appear in this case to have been the first mate, on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, (namely, the presumption and inference arising from a non-communication to the other persons on board,) as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case." (*i*)

Best proof of negative.

It has been already observed, that although the best evidence is to be given which the nature of the case admits, yet the strongest possible assurance of a fact is not required. (*j*) If a deed, for example, is attested by several subscribing witnesses, the execution may be proved by one of them: or, if none of those witnesses can be produced, proof of the signature of one witness will be sufficient; for the proof is, as far as it goes, complete, and not inferior in its kind, to any that can be produced: nor can it be inferred merely from the absence of further proof of the same kind, that such additional proof would be inconsistent with that already produced. (*k*) So, to prove the plaintiff's demand satisfied, the defendant may give evidence of an admission by the plaintiff to that effect, though it should appear that the plaintiff also signed a receipt, and it may be said the receipt would be more satisfactory proof. (1) (*l*) And, where an agent for the plaintiff

Proof of deed.

Admission of payment.

(1) Jacob v. Lindsay, 1 East, 460. Smith v. Young, 1 Campb. 439.

(*i*) See Note 417, p. 544. (*j*) See Note 418, p. 546. (*k*) See Note 419, p. 547. (*l*) See Note 420, p. 547.

made a verbal agreement with the defendant, and afterwards put it down in writing, (which was not signed by the parties,) as a memorandum to assist his recollection, such writing is not the best evidence, nor indeed any evidence of the agreement, though it may be used by the agent for the purpose of refreshing his memory. (1)(*m*) Written memorandum.

If parol evidence should be offered to prove the terms of a tenancy, it is no objection that there is some written agreement relative to the holding of the lands in question, unless it should appear that the agreement was between the landlord and tenant, and that it continued in force down to the period, to which the parol evidence applies. (2) Nor would it be a sufficient objection against the admission of parol evidence, that a written memorandum, specifying the terms, had been assented to by the defendant, if he had not signed the memorandum, as he had stipulated to do; for the memorandum would not become an agreement, until executed by the defendant; it contained a mere proposal, which had not been accepted. (3) (*n*) Terms of tenancy.

In the late prosecution of Hunt for a conspiracy, (4) the Court of King's Bench determined, that a paper, which had been delivered by the defendant to a person present at a meeting, as a copy of certain resolutions about to be proposed and read, and which was proved to correspond with the resolutions afterwards proposed, was properly received at the trial as evidence of those resolutions; without proof of any previous notice to the defendant, to produce the paper from which the resolutions were supposed to be read. This paper was considered, as against the party himself to whom it applied, to be fully as good evidence as any that could be produced. In the same case, (5) the Court of K. B. held that inscriptions on flags and banners, which had been exhibited to public view, might be proved by eye witnesses, speaking to what they had seen on the occasion; and though it appeared that the flags had been seised and taken away by police officers, (so that Resolutions at a meeting. Paper delivered by prisoner. Inscriptions.

(1) Dalison v. Stark, 4 Esp. N. P. C. 163. 1 East, 460. Ramsbottom v. Tunbridge, 2 Maule & Selw. 434.

(2) Doe d. Wood v. Morris, 12 East, 237. Doe v. Pearson, 12 East, 239, n.

(3) Doe dem. Bingham v. Cartwright, 3 Barn. & Ald. 326. Stevens v. Pinney, 8 Taunt. 328.

(4) Rex v. Hunt, 3 Barn. & Ald. 568, 572. See also Watson's case, 32 Howell's St. Tr. 68, 83, 256, 257.

(5) Rex v. Hunt, 3 Barn. & Ald. 574.

(*m*) See Note 421, p. 550. (*n*) See Note 422, p. 551.

they might have been produced,) the evidence was not considered on this account to be less competent; such inscriptions are, as the Lord Chief Justice observed, the public expressions of the sentiments of those who bear them, and have rather the character of speeches than of writings.

Resolutions *read*, proved by parol.

Whether resolutions, which have been proposed at public meetings, may be primarily proved by the parol evidence of witnesses, when the person proposing the resolutions appeared to read them from a written paper, is a much larger question than the one above mentioned. This point appears to have been much discussed in the prosecution of Dr. Sheridan and Kirwan, in Ireland, (1) who were tried for an offence against the Irish Convention Act. The indictment began with averring that divers persons had assembled together, and intending to procure the appointment of a committee of persons, (of a particular description, and for a specific object,) entered into certain resolutions respecting such committee, the purport and effect of which resolutions were set out at length; the indictment then proceeded to charge Dr. Sheridan with certain acts done by him for the purpose of assisting in forming such committee, and for carrying into effect the resolutions before mentioned. To prove the first averment, the counsel for the prosecution called a witness, who stated, that a general meeting, (at which it was admitted the defendants were not present,) the secretary of the meeting proposed a resolution, and read it from a paper. The proposition was seconded; the secretary then handed the paper to the chairman, and the chairman read it. The witness was then asked, What was the resolution? This question was objected to, on the ground, that the absence of the writing itself should be accounted for, before any parol evidence of its contents could be received. After a very full argument, a majority of the court were of opinion, that this was not a case to which the distinction between primary and secondary evidence was strictly applicable. That the proposed evidence was intended to show, not what the paper contained, but what one person proposed and what the meeting adopted; in short, to prove the transactions and the general conduct of the assembly; and that such evidence could not be

(1) 1811, 31 Howell's St. Tr. 672.

rejected, because some person present took notes of what passed. (1) The form in which the argument was presented by the solicitor general, was more striking:—"A number of persons," he said, "assemble and confer together—they agree to a certain resolution. If it be necessary to prove such a transaction in a criminal trial, would the prosecutor be bound to produce the resolution in writing? Would the prosecutor be bound by the manner in which it was taken down by one of the confederates? If the paper, supposed to contain the resolution, were produced, would that preclude the prosecutor from giving evidence of other matters which took place? Or suppose, further, that the matter were reduced to writing in such a way as to avoid a criminal imputation, although every sentence of the debate or conversation were criminal, would the prosecutor be bound by the former, and precluded from giving evidence of the latter?"

Proof of hand-writing.

For the purpose of proving hand-writing, it will not be necessary, in the first instance, to call the supposed writer himself; the evidence of persons, well acquainted with the general character of his writing, who, on inspecting the paper, can say, that they believe it to be his hand-writing, will of itself be sufficient. Such evidence is not in its nature inferior or secondary; and though it may generally be true, that a writer is best acquainted with his own hand-writing, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species; nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact, to which they speak, is not true. It is the common practice to receive such evidence in ordinary cases; as, where the signature of a magistrate, on a deposition taken before him, is to be proved, it is usually proved by a witness acquainted with the general character of his hand-writing without the evidence of the magistrate himself. (*o*)

Disproving of hand-writing in general.

But where the object, which a party has in view, is to *disprove*

(1) One of the judges held, that the evidence was inadmissible.

(*o*) See Note 423, p. 553.

hand-writing, and proved it forged, the most authentic and most satisfactory trial of the question seems to be, by resorting to the information of the supposed writer himself, in preference to the evidence of third persons, however well acquainted such persons may be with the general style of the supposed writer's hand-writing, (supposing, of course, that he is not disqualified by interest, as a party to the suit, nor for any other cause incompetent;) for a genuine and true signature may possibly, either from accident or intention, be a deviation from the general form or character of the writer's style, in which case a witness, who judges merely from the impression produced on his mind by such general character, is likely to be deceived, and would probably conclude, that a signature, so unlike the usual style of writing, must have been forged: whereas, if the person, by whom the signature professes to be made, were himself to be called as a witness, he might be able to state some peculiar circumstances within his own knowledge, and give such decisive proof, with regard to the signature in question, as at once to remove all doubt respecting its genuineness.

Disproving of signature of bank clerk.

It has been held, however, in a prosecution for the forgery of a bank note, that the signature, in the name of the cashier of the bank, may be disproved by any person acquainted with his hand-writing, (1) though the cashier himself would not be an incompetent witness. (2) And it is the common practice to disprove the signature of the entering bank clerk by this sort of evidence. In such prosecution, it may be observed, there is commonly some other proof of forgery, independent of the forgery of the signature, (in the texture of the paper, for instance, in the engraving, the ink, the date, &c.,) which additional proof would very materially confirm the other part of the case, as to the forgery of the signature. However, it must be admitted, if the proof of the forgery of the signature, by the evidence of persons acquainted with the hand-writing of the cashier or entering clerk, were in its own nature incompetent and inadmissible, as being secondary proof, the additional evidence of the forgery in

(1) By Le Blanc J., in Hughes' case, 1802, 2 East, P. C. 1002. Exeter Sp. Ass. Case of Bank Prosecutions, Russ. & Ry. Cr. C. 380, S. P.

(2) Newland's case, 1784, 2 East, P. C. 1001.

other party, confirmatory as it may be, would certainly not have the effect of rendering such proof admissible. On what specific ground this evidence was admitted in the case above referred to—whether on account of the inconvenience, likely to result from requiring the attendance of the bank clerk, who might possibly be equally wanted in similar prosecutions in other places at the same time—or whether on the supposition, that the signatures of an entering clerk, who had merely signed officially, and was not in any degree personally interested, were not likely to vary, and would generally preserve an uniform and unvaried style of writing—or whatever other reason might be assigned—the short note of the case does not enable the reader to decide.

Disproving of other person's signature.

However, this case does not appear to have decided the general proposition, that, in any prosecution for forgery, where the person, whose hand-writing is supposed to be forged, would be a competent witness, the writing may be disproved by others who are acquainted with the character of his hand-writing, without the concurrent testimony of that person himself. And in an earlier case, in which the captain of a ship was charged with having made alterations in a tradesman's receipt, with intent to defraud the ship-owner, (1) two judges (Mr. Justice Gould and Mr. Justice Yates) held, that the evidence of a partner of the tradesman could not be admitted to prove the altered parts of the receipt to be forged, but that the evidence of the person himself, in whose name the alterations purported to have been made (who was not proved to be dead, and who would have been a competent witness,) was indispensably necessary. They considered that his testimony would be the best, as he could certainly give the most satisfactory evidence on the point, whether the alterations in his bill were his own corrections, or were forged by some other hand, whereas the partner could only speak from opinion: and it was an established rule, they said, that in all cases the best evidence should be given which the nature of the case will admit; and less than that can never be received, if it appear that better might have been supplied. (*p*)

(1) Capt. Smith's case, O. B. 1768. 2 East, P. C. 1000. And vide supra, p. 223, 224.

(*p*) See Note 424, p. 554.

The rule, which requires the best evidence to be produced, is dispensed with in the following cases:

1. Entry in public book.

1. Where it is necessary to prove an entry in a public book, the original need not be shown; but, from a principle of general convenience, an examined copy will be admitted. (1) (*q*)

2 Proof of public officer.

Revenue officer.

Surrogate.

Military officer.

Collector of taxes.

Under sheriff.

2. In the case of all peace-officers, justices of the peace, constables, &c. it is sufficient to prove, that they acted in these characters, without producing their appointments. (2) (*r*) And in the case of officers of any branch of the revenue, where the question is whether they are such, proof of being reputed to be so, or of having exercised the office, is good evidence of the fact, on any indictment, information, action, or prosecution. (3) On an indictment for perjury, committed by the defendant before a surrogate in an ecclesiastical court, proof that the person who administered the oath, acted as surrogate, has been held to be sufficient *prima facie* evidence of his appointment and authority. (4) On an information against a military officer for making false returns, it is sufficient to prove, that he acted in the character alleged in the charge, without adducing direct evidence of his appointment. (5) In an action for penalties against a collector of taxes, proof of his collecting the taxes is sufficient proof of his being collector, though his appointment is by warrant under an act of parliament. (6) And proof of a person's acting as under-sheriff is sufficient proof of his authority to do any act necessary in the course of the office; as, for instance, to make an assignment of a lease, under an execution, in the name of the sheriff. (7) (*s*)

3. Proof by admission of party.

3. There are other instances in which strict proof is made unnecessary, because the party, against whom it would otherwise be requisite to produce proof of the particular fact, has by

(1) See infra, part 2, c. 6, *ad finem*.

(2) By Buller, J. in Berryman v. Wise, 4 T. R. 366. By the opinion of all the judges in the case of the Gordons, tried for murder in 1789, Leach, Cr. C. 585.

(3) St. 26 G. 3, c. 77, s. 13, st. 26 G. 3, ch. 82, s. 6; and see st. 11 G. 1, ch. 30, s. 32.

(4) Rex v. Verelst, 3 Campb. 432. Rex. v. Creswell, Lond. Sitt. after Mich. 1816, S. P.

(5) R. v. Gardner. 2 Campb. 513.

(6) Lister, q. t. v. Priestly, Whitewick, Rep. 67.

(7) Doe dem. James v. Brawn, 5 Barn. & Ald. 243.

(*q*) See Note 425, p. 554. (*r*) See Note 426, p. 554. (*s*) See Note 427, p. 554

his conduct precluded himself, in the way of estoppel, from disputing the fact. (1) (*t*) There are few cases, indeed, in which a person's acts operate against him as an estoppel, though they may often be used as good *prima facie* evidence against him. (2) Such is the rule in an action against clergymen for non-residence, in which it is reasonable that the acts of the defendant as parson, and his receipt of the emoluments of the church, should be evidence against him of his being parson, without formal proof of his title. (3) (*u*)

Receipt of tithes.

In an action by a person, as farmer and renter of tolls, appointed under an act of parliament, for tolls due at a turnpike gate, although the plaintiff will not be entitled to recover on the special count, unless he has been legally appointed collector of the tolls, yet, if the defendant has accounted with him in that character, the want of a formal appointment will not preclude him from recovering on an account stated. (4)

Accounting with another.

In an action for penalties under the post-horse act, brought by the plaintiff as farmer-general, proof of his appointment was dispensed with, because the defendant had previously accounted with him as farmer-general. (5) In an action for subtraction of tithes, proof of the defendant's former acknowledgment of the plaintiff's title to the tithes was thought to be sufficient evidence, as against the defendant a wrong-doer. (6)

Accounting with one in his office.

Acknowledgment of title, on former occasions.

In an action against the defendant for slander, in charging the plaintiff with being a swindler, and threatening that he would have him struck off the roll of attornies, the Court was of opinion, that the defendant's threat amounted to a distinct acknowledgment that the plaintiff was an attorney, and dispensed with further proof. (7)

Admission on the particular occasion.

(1) By Chambre, J., Smith v. Taylor, 1 Bos. & Pul. N. R. 210; and see the cases cited supra, p. 89.

(2) By Chambre, J. 1 New Rep. 210.

(3) By Chambre, J. 1 New Rep. 210. Bevan q. t. v. Williams, n. (a,) 3 T. R. 635.

(4) Peacock v. Harris, 10 East, 104.

(5) Radford q. t. v. Macintosh, 3 T. R. 632. And see Cross v. Kaye, 6 T. R. 663, and 1 New Rep. 205, 211.

(6) 1 Bos. & Pul. N. R. 210. 3 T. R. 635. 4 T. R. 366. Chapman v. Beard, 3 Anstr. 492. 4 Gwill. 1483, S. C.

(7) Berryman v. Wise, 4 T. R. 366.

(*t*) See Note 428, p 556. (*u*) See Note 429, p 556.

The principle to be extracted from these cases seems to be, that where a defendant, in the course of the transaction, on which the action is founded, has admitted the title, by virtue of which the plaintiff sues, it amounts to *prima facie* evidence, that the plaintiff is entitled to sue.(1) Upon this principle two of the Judges of the Court of Common Pleas were of opinion, that the plaintiff was entitled to recover in the case of Smith v. Taylor. (2) That was an action for defamation, in which the plaintiff averred, that he was a physician, and exercised the profession, and that the words were spoken concerning him as a physician. It appeared, that the words did not impute want of *qualification* by degree, but only want of *skill* in practice; and that the defendant called the plaintiff "*Dr. S.*," when he spoke the words: and, further, the defendant, as an apothecary, had followed the directions of the plaintiff, as a physician, in the business out of which the cause of action arose. These circumstances were considered by the other judges, sufficient *prima facie* evidence of the plaintiff's qualification. On the other hand, if the words imply a charge, that the plaintiff was not qualified to act in the particular character which he assumed, it has been held that the qualification ought to be proved, and that it will not be sufficient to show his acting in that capacity. (3) And where the words imply merely ignorance or negligence, without admitting the plaintiff to be qualified, and the plaintiff avers that he is qualified, he will be bound to prove his qualification. (4) (*v*)

Words implying qualification.

Words not so implying.

Admissions.

Of assignment of lease.

The proof of an admission of a fact by a party to the suit has, in many cases, been considered sufficient to dispense with the strict and regular proof, which would otherwise have been necessary. If a lessee acknowledges, that he has assigned the lease to another person, this is evidence against him of his having transferred all his interest in the premises, though an assignment can only be effected by some instrument in writing. (5) And admission by the defendant, that a third person had become a

(1) By Heath, J. 1 New Rep. 208.
(2) 1 New Rep. 197, by Mansfield, Ch. J. and Heath, J. ; but Rock, J. and Chambre, J. were of opinion, that the words did not admit the qualification.
(3) See the judgment of Mansfield, Ch. J. in 1 New Rep. 204, 207 Pickford v. Gutch, 8 T. R. 305, n. (a); Moises v. Thornton, 8 T. R. 303.
(4) See 1 New Rep. 204, 207.
(5) Doe dem. Lowden v. Watson, 2 Starkie, N. P. C. 230.

(*v*) See Note 430, p. 556.

bankrupt, is evidence of the bankruptcy, in an action brought by the assignee of the bankrupt; and will dispense with the necessity of going through the formal proof of the trading and act of bankruptcy, as in ordinary cases. (1) So, if the defendant has acknowledged, that he agreed to pay a certain sum of money for tithes leased to him by the plaintiff, this will be sufficient proof of the agreement, in an action on a composition for tithes, although it appear that the agreement is in writing, and in the plaintiff's possession. (*w*)

Of bankruptcy.

Of composition for tithes.

Sect. VII.

Hearsay is not Evidence.

Hearsay evidence is the statement which a witness professes to have heard given by a third person, as to some particular transaction or thing; literally, what the witness says he heard another person say. This is hearsay in the *first* degree. If the supposed third person stated the alleged fact, not as being within his personal knowledge or experience, but as something which he had heard from another, it is hearsay in the *second* degree at the nearest, perhaps in a much remoter degree. Hearsay is not admitted in our courts of justice, as proof of the fact which is stated by a third person. This general rule (subject to certain exceptions, hereafter to be mentioned) has been recognized and approved, from the earliest times, as a fundamental principle of the law of evidence, and is always to be strictly observed. (*x*) Some of our earliest writers lay it down as a proposition, acknowledged in our courts, and not to be questioned, that matters of fact shall be tried by proof of witnesses, upon oath, before the judges. (2) This implies, that the person on whose statement any fact is to be proved, must be sworn in the regular form, and speak to the fact from his own personal knowledge, in open court, at the time of trial. (*y*)

Hearsay.

It is a general principle, then, in the law of evidence, that if any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to

(1) Maltby, assignee of Dourouveray v. Christie, 1 Esp. N. P. C. 340, cited 16 East, 193. Dickenson, assignee of Booth, v. Coward, 1 Barn. & Ald. 677, stated in vol. ii. See Bloxam v. Elsie, 1 Ry. & Mo. 187. Scott v. Clare, 3 Campb. 236, stated supra, p. 219.

(2) Sheppard's Abridgment, title "Tryal." Rolle's Abridgment.

(*w*) See Note 431, p. 556. (*x*) See Note 432, p. 558. (*y*) See Note 433, p. 568.

speak the truth; and the reason of the rule is, because evidence ought to be given under the sanction of an oath, and that the person who is to be effected by the evidence, may have an opportunity of interrogating the witness, as to his means of knowledge, and concerning all the particulars of his statement. (*z*)

Letters or private papers written by a third person, are open to the same objection precisely, in point of principle, as *hearsay* declarations; being statements made without oath, and not in the presence of the party, who would be prejudiced by them. In one respect, indeed, there is a difference between written and oral statements; that the former are more easily proved to be genuine than the latter. A written account is proved to be genuine, by proof of the hand-writing; whereas the genuineness of mere oral declarations must depend upon the memory and accuracy of the witness who professes to repeat them. But this distinction, it is evident, relates only to their comparative value, and cannot affect the question of their *admissibility*. (*a*)

The most convenient order for treating this subject will be, first, to mention certain cases, clearly distinguishable from cases of hearsay; and then to state the exceptions to the general rule.

Testimony on former trial.

First, the testimony of a deceased witness, (*b*) who has been examined upon oath, on the trial of a former action (*c*) between the same parties, (*d*) and where the point in issue is the same (*e*) as in the second action, is admissible (*f*) on the trial of the second action, and may be proved by one who heard him give evidence, (1) for such evidence on the former trial was not given in an extra-judicial manner, but upon oath: the parties to the suit were the same, the point in issue was the same, and an opportunity was given for cross-examination. These circumstances plainly distinguish the proposed evidence from hearsay. So, where a person, who had been sworn on a former trial between the same

Witness dead.

(1) R. v. Carpenter, 2 Show. 47. Buckworth's case, Sir T. Raym. 170. Vin. Ab. "Evidence, (T. b. 88.) pl. 4. Coker v. Farewell, 2 P. Wms. 563. Pike v. Crouch, 1 Ld. Raym. 730. By Lord Kenyon, 4 T. R. 290. Mayor of Doncaster v. Day, 5 Taunton, 262.

(*z*) See Note 434, p. 569. (*a*) See Note 435, p. 569. (*b*) See Note 436, p. 571. (*c*) See Note 437, p. 571. (*d*) See Note 438, p. 572. (*e*) See Note 439, p. 575. (*f*) See Note 440, p. 575.

parties on the same issue, and subpœnaed to appear as witness at a second trial, did not appear in obedience to the writ, the Court of King's Bench, seeing reason to believe that he had been kept away by the contrivance of the adverse party, admitted other witnesses to prove what he had sworn on the former occasion. (1) (*g*)

Witness kept away.

It has been laid down, in Lord Palmerton's case, that the person called to prove what a deceased witness said on the former trial, must undertake to repeat precisely his very words, and not merely to swear to their effect. (2) And, in a case before Lord Kenyon, a witness was not allowed to speak to the effect of what the deceased witness had sworn. "He ought," said Lord Kenyon, "to recollect the very words; for the jury alone can judge of the effect of words." (3) This, it is conceived, can only mean, at the furthest, that he must be able to speak to the identical words of the former witness, when it is essential that the very identical words should be known. In some cases, proof of the *substance* of the former evidence may be as satisfactory as proof of the identical words, unless the witness can undertake (what is not possible) to deliver the same words precisely with the same manner, and in the same tone. (*h*)

How proved.

For the purpose of introducing an account of what a deceased witness swore on the first trial, the nisi prius record and the postea indorsed are good evidence to show, that a cause was brought on for trial, or that it was actually tried. (4) (*i*)

Proof of former trial.

Secondly, hearsay is often admitted in evidence, as constituting a part of the transaction which is the subject of inquiry; the meaning of which seems to be, that where it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it, is admissible in evidence, for the purpose of showing its true character. (*j*) Thus, for example, in an action by the assignees of a bankrupt, the declarations of

Hearsay, part of the transaction.

Declaration of trader in absenting.

(1) Green v. Gaturk, Bull. N. P. 243.

(2) Lord Palmerton's case, cited by Lord Kenyon, in R. v. Joliffe, 4 T. R. 290.

(3) Ennis v. Domisthorne, Cornw. Sum. Ass. 1789, MS. Lord Kenyon cited the case of the King v. Deborah, from one of his own notes.

(4) Pitton v. Walter, 1 Str. 162.

(*g*) See Note 441, p. 576. (*h*) See Note 442, p. 578. (*i*) See Note 443, p. 585. (*j*) See Note 444, p. 585.

Part of res gesta.

the trader at the time of his absenting himself from home, or immediately subsequent, are properly received in evidence, to show the motive of his absence: for it is the intent with which he departed from his dwelling-house, that constitutes the act of bankruptcy. (1) (*k*)

In making purchases.

A statement by a purchaser of goods at the time of the purchase, as to his intention in making the purchase, is admissible, in an action by the assignees of a bankrupt, when the question is, whether the person sought his living by buying and selling. (2)

Statement by payee of note.

For the same reason, letters written by the payee of a promissory note to the maker, contemporaneous with the making of the note, and forming a part of the original transaction, are admissible in evidence, to prove the consideration passing between the parties; and this also in an action by the indorsee against the maker. (3) It cannot be more necessary to call the party who wrote, than, in the case of a verbal agreement, to call the party who spoke the words. A written agreement is proved by the writing, as a verbal agreement may be proved by a witness who heard the parties agree. (*l*)

Statement in receiving personal injury.

In the case of Thompson and wife against Trevanion, which was an action of Trespass and assault, Lord C. J. Holt allowed what the wife said, immediately on receiving the hurt, to be given in evidence. (4) Inquiries by medical men, with the answers to such inquiries, are evidence of the state of health of the patient at the time; such evidence is admissible from the very nature of the thing. (5) And it is in every day's experience, that what a man has said of himself to his surgeon, is evidence in an action of assault, to show what he has suffered by reason of the assault. (6)(*m*)

(1) Ambrose v. Clindon, Rep. temp. Hard. 267. Marsh v. Meager, 1 Starkie, N. P. C. 353. See on this subject, vol. 2, part 2.

(2) Gale v. Halfknight, 3 Starkie, N. P. C. 58.

(3) Kent v Lowen, 1 Campb. 177. 180, d. For other examples in illustration of the same rule, see Rex v. Hathaway, 14 Howell's St. Tr. 654. Du Bost v. Beresford, 2 Campb. 512. Collenridge v. Farquharson, 1 Starkie, N. P. C. 261. Bull. N. P. 17.

(4) Skinn. 402, cited by Lord Ellenbornugh in 6 East, 193.

(5) By Lord Ellenborough, 6 East, 195.

(6) By Lawrence, J., 6 East, 198.

(*k*) See Note 445, p. 586. (*l*) See Note 446, p. 587. (*m*) See Note 447, p. 587.

Part of res gestæ.

Representation of deceased as to state of health.

In the case of Aueson v. Lord Kinnaird, (1) (where, in an action on a policy of insurance of a life, in order to ascertain whether the deceased was in a good state of health on the day of the insurance, it became material to consider what the state of health was both before and after that day,) the account, which the deceased gave some days after obtaining the certificate of good health, respecting her state on the former day, was admitted at the trial, as evidence on the part of the defendant; and the Court of King's Bench were of opinion, that it had been properly admitted. The Judges held the evidence unexceptionable, on general principles, as the account of the deceased concerning her existing state of health, which was the subject of inquiry; they considered it admissible also in another point of view, for, as the surgeon, who had given the certificate, and who was called as witness on the part of the plaintiff, had formed his opinion of the state of health of the deceased principally from the answers she had given to his inquiries, it was only a species of cross-examination of the same witness, to shew, from what the deceased had said of herself to another witness very recently before, that she was not really well on the day when she gave that account to the surgeon. (2)

Effect of such evidence.

Indictment for rape.

The account given by a person, in answer to the questions of a medical man, it is to be observed, is evidence of complaints and symptoms, and of what the person suffers from his bodily state, when an inquiry into such particulars is material; but it is not evidence to charge another person as the cause of those sufferings, nor is such an account any evidence of the truth of the statement. In prosecutions for a rape, it is the common practice, and is strictly regular, to inquire whether the woman made a complaint against the prisoner, recently after the injury; (*n*) but the particulars of the complaint, stated by her on the former occasion, are clearly not admissible as evidence of the truth of her statement. That statement having been made in the absence of the prisoner, cannot be used as evidence against him; nor can it be admitted as evidence in confirmation of her statement at the trial. (3)

(1) 6 East, 188, 198.
(2) 6 East, 195, 197, 198.
(3) Brazier's case, 1 East, P. C. 444. R. v Clarke, 2 Starkie, N. P. C. 242.

(*n*) See Note 448, p. 587.

Part of res gesta.

In an action for criminal conversation, where the defence was, that the plaintiff had connived at his wife's elopement, evidence was received, on the part of the plaintiff, of the wife's declarations as to her intention and purpose in going; (1) for the question in effect was, whether the husband knew that she was about to elope, or whether he believed that her intention was as she represented. (*o*)

Principle of rule.

What a third person has said or written is admissible, in many cases, as amounting to an act done by him, or as showing his knowledge, or as evidence of his conduct. If, for instance, it is material to inquire, whether a certain person gave a particular order on a certain subject, what he has said or written may be evidence of the order; (*p*) or where it is material to inquire, whether a certain fact, be it true or false, has come to the knowledge of a third person, what he has said or written may as clearly show his knowledge, as what he has done. Where it is relevant and material to inquire into the conduct of rioters, what has been said by any of the party in the act of rioting must manifestly be admissible in evidence, as showing their design and intention. (*q*) On a charge of larceny, where the proof against the prisoner is, that the stolen property was found in his possession, it would be competent to show, on behalf of the prisoner, and a third person left the property in his care, saying that he would call for it again afterwards; for it is material, in such a case, to inquire, under what circumstances the prisoner first had possession of the property. And a variety of other instances might be mentioned of a similar nature. (*r*)

Exceptions.

There are certain exceptions to the general rule on the subject of hearsay, which are perhaps as ancient as the rule itself, and have been allowed, either because the inconvenience and danger, commonly attending such evidence, are not likely to occur in the excepted cases, or because greater inconvenience would result from its exclusion than from its admission.

The exceptions are here considered, in the following order. First, as to dying declarations. Secondly, as to hearsay in ques-

(1) Hoare v. Allen, 3 Esp. N. P. C. 276, before Ld. Kenyon on second trial, who said, that some of the judges, on the motion for a new trial, were of opinion, that this evidence ought to be admitted. And see 6 East, 193, by Ld. Ellenborough.

(*o*) See Note 449, p. 587. (*p*) See Note 450, p. 588. (*q*) See Note 451, p. 588. (*r*) See Note 452, p. 589.

tions of pedigree. Thirdly, as to hearsay on questions of public right, customs, boundaries, &c. Fourthly, as to the admissibility of old leases, rent-rolls, surveys, &c. Fifthly, as to the admissibility of declarations against interest. Sixthly, as to the admissibility of rectors' and vicars' books. Seventhly, and lastly, as to the admissibility of the books of tradesmen. Dying declarations.

First, as to the admissibility of dying declarations.

The dying declarations of a person, who has received a mortal injury, that is, declarations made under the apprehension of death, are constantly admitted in criminal prosecutions, when the death of the deceased is the subject of the charge against the prisoner. (1) The principle of this exception to the general rule is founded partly on the awful situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on a supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination. Dying declarations. Prosec. for murder.

Before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved, that the deceased, at the time of making them, was conscious of his danger, and had given up all hope of recovery. This consciousness of approaching death is to be collected either from the circumstances of the case, (as, from the nature of the wound and the state of body,) or from expressions used by the deceased. (2) And it has been decided by all the Judges, that the question, whether the deceased made the declarations under the apprehension of death, is a question for the Judges, not for the jury to determine, previous to their admission. (3) (*s*) Sense of danger.

(1) Lord Mohun's case, 12 Howell, St. Tr. 966. R. v. Reason and Tranter, 1 Str. 499. 6 St. Tr. 202—205, S. C 16 Howell, St. Tr. 26. Woodcock's case, 2 Leach, Cr. C 566. Bambridge's case, 9 St. Tr. 161, S. C. 14 Howell's St. Tr. 417. Tinkler's case, 1 East, P. C. 354. The same rule has been at all times adopted in Scotland ; see Hume's Commentaries, vol. 2, 391.

(2) Woodcock's case, 2 Leach, Cr. C. 566. Dingler's case, ib 638. John's case, 1 East, Pl. Cr. 357.

(3) By the opinion of all the judges, in John's case, 1 East, Pl. Cr. 357, and in Welborne's case, 1 East, Pl. Cr. 359. In Woodcock's case, which was before the two last, this question had been left to the jury by Eyre, C. B., 1 East, Pl. Cr. 360.

(*s*) See Note 453, p. 606.

Dying declarations.

Witness to bond or will.

The declaration of a subscribing witness to a bond, who in his dying moments begged pardon of Heaven for having been concerned in forging the bond, was admitted, by Mr. Justice Heath, (1) as evidence of the forgery, on the authority of Wright on the demise of Clymer v. Littler, (2) where similar evidence of a dying confession, by a subscribing witness to a will, had been received by Chief Justice Willes, and afterwards approved by the Court of King's Bench.

With the exception of this case, the general rule respecting the admissibility of dying declarations is, that they are admissible only in criminal prosecutions, where the death of the deceased is the subject of the charge against the prisoner. On a question of pedigree, in an action of ejectment, it has been lately determined, that the dying declarations of a person, as to the relationship between the lessor of the plaintiff and the person last seised of the premises in question, (the deceased not being himself a relation, nor in any manner connected with the parties,) cannot be received in evidence. (3)

Question of pedigree

After attainder.

The declarations of a criminal at the time of his execution, cannot be received on the trial of an accomplice; for, after attainder, he could not have been sworn as a witness; (4) (*t*) and, independently of this objection, this would not be admissible, on the general principle.

Not evidence in other prosecutions.

The dying declarations of a prosecutor, in an indictment for perjury, cannot be used in showing cause against a motion for a new trial: (5) nor could they have been used as evidence at the trial. On a prosecution for administering drugs to a woman pregnant, but not quick with child, with intent to procure abortion, the dying declarations of the woman have been held

(1) Cited by Lord Ellenborough, in Aveson v. Lord Kinnaird, 6 East, 195.

(2) 3 Burr. 1244, 1255. 1 Blac. Rep. 346, S. C. See 4 Barn. & Ald. 44.

(3) Doe dem. Sutton v. Ridgway, 4 Barn. & Ald. 53.

(4) Drummond's case, 1 Leach, Cr. C. 378; 1 East, Pl. Cr. 353, S. C. In the earlier state trials, the examination of convicts were not unfrequently used in evidence against persons charged with the same offence.

(5) R. v. Mead, 2 Barn. & Cress. 605.

(*t*) See Note 454, p. 609.

not to be admissible. (1) So, also, in trials for robbery, the dying declarations of the party robbed. (2) (*u*)

Dying declarations.

Dying declarations have been admitted in evidence, although it appeared that the deceased made a subsequent statement, which had been taken in writing before a magistrate, but the written examination was not ready to be produced at the trial. This point was much discussed on the trial of Reason and Tranter, under the following circumstance: (3)—The deceased stated the particulars of the injury, which occasioned his death, at three several times in the course of the same day, with an interval of about an hour between each: the first and last account had not been written; the second was reduced into writing, in the presence of a magistrate, by the same person to whom the former account had been given; this written statement was retained by the magistrate, and as he had removed to a distant part of the country, and it was not known to what place, the original was not produced, and an examined copy was rejected. An argument then ensued with respect to the admissibility of the first statement of the deceased. The Chief Justice (Sir John Pratt) was of opinion, that evidence of the first and third statement ought not to be received, considering all three as statements to the same effect, and forming one entire narrative, of which the written examination was the best proof. But the other Judges (4) were of a different opinion; they held, that the three accounts given by the deceased were distinct facts, and that there was no reason to exclude the evidence as to the first and third declaration, because the prosecutor was disabled from giving an account of the second. The witness was therefore directed to repeat his evidence, laying the examination before the justices out of the case; and the first, as well as the third statement was admitted. (*v*)

Where subsequent written declarations.

(1) By Bayley, J. in R. v. Hutchinson, 2 Barn. & Cress. 608, n. (*a*).

(2) By Mr. Justice Bayley on the northern Spring circuit, 1822. And by Best, C. J. on the midland Spring circuit, 1822.

(3) 6 St. Tr. 202—205, S. C. 16 Howell's St. Tr. 31. 1 Str. 499, S. C.

(4) 1 Str. 500. The reporter was one of the counsel for the prosecution. From the report in the State Trials, it would appear, that the Chief Justice and Mr. Justice Powis were against receiving the evidence; and Mr. Justice Eyre and Mr. Justice Fortescue for receiving it. The evidence, however, according to that report, was at last received.

(*u*) See Note 455, p. 610. (*v*) See Note 459, p. 611.

In case of pedigree.

As the declarations of a dying man are admitted, on a supposition that, in his awful situation on the confines of a future world, he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows, that the party, against whom they are produced in evidence, may enter into the particulars of his state of mind and of his behaviour in his last moments: or may be allowed to show, that the deceased was not of such a character, as was likely to be impressed by a religious sense of his approaching dissolution. (*w*)

Character of deceased.

On question of Pedigree.

Secondly, with regard to hearsay on questions of pedigree.

On inquiring into the truth of facts which happened a long time ago, the Courts have varied from the strict rules of evidence applicable to modern facts of the same description, on account of the great difficulty of proving those remote facts in the ordinary manner by living witnesses. (1) On this principle, hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact, handed down from one to another) have been admitted as evidence in cases of pedigree. (1) (*x*) Thus, declarations of deceased members of a family are admissible evidence to prove relationship: as, who was a person's grand-father, or whom he married, or how many children he had, or as to the time of a marriage or of the birth of a child, and the like, of which it cannot be reasonably presumed, that better evidence is to be procured. In ancient times, while the feudal system prevailed, great facilities of establishing descents were afforded by means of inquisition *post mortem*. The heads of families, upon these occasions, made solemn declarations, which were preserved as matter of record. (2) But, these having now grown into disuse, it is often extremely difficult to prove a pedigree; and recourse must be had, from necessity, to the best evidence that the nature of the subject will admit. In a late case, proof by one of the family, that a particular person had many years before gone abroad,

Relationship.

Marriage.

Birth.

Death.

(1) By Le Blanc, J. in Hingham v. Ridgway, 10 East, 120. And see the Lord Chancellor's judgment in the case of Vowels v. Young, 13 Ves. 143; and the opinions of the Judges in the Berkeley peerage case, 4 Campb. 404—421. Bull. N. P. 295.

(2) 13 Ves. 145. Bull. N. P. 294.

(*w*) See Note 457, p. 611. (*x*) See Note 458, p. 612.

and was supposed to have died there, (*y*) and that the witness had not heard in the family of his having married, (*z*) was considered by the Court of King's Bench good *prima facie* evidence of the person's death without lawful issue. (1) In case of pedigree.

It is not, however, every statement or tradition that can be admitted in evidence. (*a*) "The tradition," said Lord Eldon, in the case of Whitlocke v. Baker, (2) "must be from persons having such a connection with the party to whom it relates, that it is natural and likely from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. Declarations in the family, (*b*) descriptions in wills, descriptions upon monuments, in Bibles (*c*) and registry-books, (*d*) are all admitted, upon the principle that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position without any temptation to exceed or fall short of the truth. Wills. Monuments.

Descriptions in family Bibles have been mentioned only by way of example. The admissibility of such entries, it is scarcely necessary to observe, can in no degree depend upon the circumstance of their being inserted in the family Bible, though on that account the statement may be entitled to greater consideration. A memorandum inserted in any other book by one of the family, may be given in evidence. So, a will by an ancestor is evidence on a question of pedigree, (though it be found cancelled, and not known to have been proved or acted upon,) if it appears to have been treated as a paper relating to the family. (3) And recitals in family deeds, (*e*) monumental inscriptions, engravings on rings, old pedigrees hung up in a family mansion, and the like, (in which it is improbable that a description would be suffered to continue, if erroneous,) are all of them admissible upon the same principle. (4) Family books. Will. Deeds. Engravings, &c.

Declarations made by a deceased husband, as to the legitimacy of his wife, are evidence, though he was not related to her by Whose statements.

(1) Doe dem. Banning v. Griffin, 15 East, 293. Doe dem. George v. Jesson, 6 East, 80.
(2) 13 Ves. 514. Edwards v. Harvey, 1 Cooper, Ch. Rep. 39.
(3) Doe dem. Johnson v. Lord Pembroke, 11 East, 505.
(4) 13 Ves. 144. Bull. N. P. 233. Cowp. 594. 10 East, 120.

(*y*) See Note 459, p. 613. (*z*) See Note 460, p. 615. (*a*) See Note 461, p. 615.
(*b*) See Note 461, b. 615. (*c*) See Note 463, p. 615. (*d*) See Note 464, p. 616.
(*e*) See Note 465, p. 616.

In case of pedigree.

blood; for the husband must be supposed to have more intimate knowledge on that subject, than a distant relation. (1) But the opinion of deceased neighbors, or of servants, or of mere acquaintances, not connected with the family, are not evidence on a question of pedigree; (2) nor is the hearsay of a relative to be admitted, when the relative himself can be produced. (3) (*f*)

Of persons *in puri jure.*

The declarations of a deceased relative are admissible, notwithstanding that, if he were alive, he would stand *in puri jure*, with the party, on whose behalf such evidence is tendered, and have the same right to recover. (4) (*g*) In a case of title to a peerage before the House of Lords, a widow was allowed to prove the declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right, which the declarations went to establish; and this has been followed ever since. Such observations are admissible, though subject to observation. (5)

Time of birth.

On a question, whether a testator at the time of making his will was of full age, a written memorandum by his deceased father, stating the time of his birth, has been admitted to be good evidence. (6) Here the controversy was not, as in a question of pedigree, from what parents he derived his birth, but at what precise time an undisputed birth had happened. Still, however, the observation, before made, applies to this sort of evidence, namely, that the father had peculiar means of knowing the fact in dispute without any interest to misrepresent it, and the fact itself was not a matter of notoriety, but necessarily lying within the knowledge of a few individuals of the family. (*h*)

Legitimacy.

So, on a question of legitimacy, the declarations of deceased persons, supposed to have been married (who might themselves be examined, if alive,) are admissible to disprove the fact of marriage. (7) (*i*)

(1) Vowels v. Young, 13 Ves. 148. Doe dem. Northey v. Harvey, 1 Ry. & Mo. 297.

(2) 13 Ves. 147, 514. 18 Ves. 443, 446. 3 T. R. 723. 1 Maule & Selw. 689. 14 East, 330. Johnson v. Lawson, 2 Bing. 86.

(3) Pendrel v. Pendrel, 2 Str. 924. Bull. N. P. 113. Harrison v. Blades, 3 Camp. 457.

(4) Doe dem. Tilman v. Tarver, 1 Ry. & Mo. 141.

(5) By Lord Tenterden, C J., 1 Ry. & Mo. 142.

(6) Herbert v. Tuckal. Tr. at bar, Sir T. Raym. 84, cited in Brune v. Rawlins, 7 East, 299; and see 10 East, 120.

(7) R. v. Bramley, 6 Tr. R. 330. May v. May, 1762, Tr. at bar, Bull. N. P. 112.

(*f*) See Note 466, p. 617. (*g*) See Note 467, p. 621. (*h*) See Note 468, p. 621. (*i*) See Note 469, p. 622.

Declarations *post litem motam.*

Time of birth.

From analogy to the case just mentioned (in which the declarations of a parent have been received as evidence of the time of the child's birth,) the declaration or written memorandum of a deceased surgeon, respecting the time of a birth at which he attended, appears to be evidence, as having been made on a matter peculiarly within his knowledge. (1) (*j*)

Place of birth.

The declarations of a deceased parent, though they are evidence of the time of a child's birth, will not be admitted as evidence of the place of the birth. (2) "The point in dispute," said Lord Ellenborough, in a case where the admissibility of such evidence was discussed, "turns on a single fact involving only a question of locality, and, therefore, not falling within the principle of the rules applicable to cases of pedigree." (*k*)

Want of access.

Nor can the declarations of a father or mother be received, after their deaths, to prove the want of access, so as to bastardize a child during the marriage; for they could not be examined to that fact, if alive; (3) and, even if that objection were removed, still the case would not come within the principle on which such hearsay evidence can be made an exception to the general rule; as want of access, (4) implying the continued separation of the parties, must be notorious to the whole neighborhood, where they have resided, and is, therefore, capable of more satisfactory proof. (*l*)

Relief, hiring.

The declaration of a deceased person, as to having been relieved by a parish, (5) or as to having been hired for a year, (6) are manifestly not any evidence of those facts, on an appeal against an order of removal. (*m*)

Declarations *post litem motam.*

The declarations of a deceased member of the family, on a question of pedigree, are not to be admitted, unless, as was before mentioned, they have been made under circumstances, when the nar-

(1) See 10 East, 120, and Vin. Ab. Ev. T. b. 91.
(2) R. v. Erith, 8 East, 542.
(3) R. v. Reading, Rep. temp. Hard. 79. Stapleton v. Stapleton, ib. 277. Bull. N. P. 113, S. C. Stevens v. Moss, Cowp. 592. R. v. Luffe, 8 East, 203. R. v. Kea, 11 East, 133.
(4) Bull. N. P. 113.
(5) R. v. Chadderton, 2 East, 29.
(6) R. v. Neuneham Courtney, 1 East, 373. R. v. Ferry Fristone, 2 East, 55. R. v. Aberwilly, 2 East. 63.

(*j*) See Note 470, p. 623. (*k*) See Note 471, p. 624. (*l*) See Note 472, p. 624. (*m*) See Note 473, p. 625.

Declarations *post litem motam.*

rative may be supposed to be without interest and without bias. If they were made on a subject in dispute, after the commencement of a suit, or after a controversy preparatory to one—or if made respecting some matter, on which a controversy existed at the time—they ought not to be received in evidence, on account of the probability, that they were partially drawn from the deceased, or, perhaps, intended by him, to serve one of the contending parties. (1)

There has been some difference of opinion on this subject. In a case reported in Viner's Abridgment, (2) Ch. B. Reynolds refused to admit declarations, which had been made at a time when the point had become the subject of controversy. On the other hand, such evidence was received by Lord Camden; (3) and Lord Mansfield, in the case of Stevens v. Moss, (4) was of opinion, that an answer* by a deceased mother to a bill filed against her, stating the time of a child's birth, might be admitted as evidence on the footing of a declaration. On the trial of the cause, Mr. Baron Eyre rejected this answer, together with the general declarations of the father and mother; in consequence of which, an application was made to the Court of King's Bench for a new trial. Lord Mansfield, on that occasion, considered the rejection either of the general declarations, or of the answer, to be a sufficient ground for a new trial: but he adverted more particularly to the former: and it does not appear from the report, that he laid any great stress on the rejection of the answer. Mr. Justice Aston concurred with

(1) Cases infra.

(2) Dev. Sp. Ass. 1731, Vin. Ab Ev. [T. b. 91.]

(3) Hayward v. Firmion, Sitt. after Trin. Term, 1766; cited by Lawrence J. in the Berkeley peerage case; and see Nichols v. Parker, 14 East, 331, n.

(4) Cowp. 591.

* The answer is described by the reporter of this case as an answer in Chancery. It appears from an inquiry, which was made in the case of the Berkeley peerage, that proceedings had been instituted in the Court of Chancery, and that afterwards a bill was filed in the Exchequer by the younger son, claiming as a legitimate child, against the mother, who was administratrix of her deceased husband. The mother in her answer averred, that the complainant was born before marriage and illegitimate. Now, as she was entitled as administratrix to a distributive share of the husband's effects, and was therefore interested to defeat the right of any other persons, who might claim a part under the distribution, her answer most clearly ought not to have been admitted. This objection, however, was not adverted to; nor does it seem to have occurred, that the statement in the answer was inadmissible, as having been made after the commencement of a suit.

Lord Mansfield in opinion, that the general declarations ought to have been admitted, but delivered no opinion on the other point. Thus, the authorities on this subject appear to have been, at one time, nearly evenly balanced.

Declarations *post litem motam.*

The rule on this subject appears to be now settled by the opinions delivered by the judges in the case of the Berkeley peerage claim. (1) A question was, on that occasion, proposed to the Judges, in the following terms: (2) "Upon the trial of an ejectment respecting Black Acre between A. and B. (in which it was necessary for A. to prove that he was the legitimate son of J. S.,) A., after proving by other evidence that J. S. was his reputed father, offered to give in evidence a deposition made by J. S. in a cause in Chancery, instituted by A. against C. D. in order to perpetuate testimony to the alleged fact (disputed by C. D.,) that he was the legitimate son of J. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D. B., the defendant, in the ejectment, did not claim Black Acre under either A. or C. D., the plaintiff and defendant in the Chancery suit. According to law, could the deposition of J. S. be received in evidence upon the trial of such ejectment against B., as evidence of declarations of J. S., the alleged father, in matters of pedigree?" The Judges who were present afterwards stated their opinions at length, and with only one dissentient voice, agreed in considering the deposition of J. S. to be inadmissible. Mr. Justice Lawrence delivered his opinion in the following terms: (3) "The declarations of members of the family, in matters of pedigree, are generally admitted from the necessity of the case; but the administration of justice would be perverted, if such declarations could be admitted, which have not a presumption in their favor, that they are consistent with truth. Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject (which may be fairly inferred

Berkeley peerage case.

(1) May 13, 1811, MS. 4 Campb. 401, S. C. See also the case of the Banbury peerage claim, 1809, 2 Selw. N. P. 731. 1 Simon and Stewart's Rep. 153, S. C. Doe dem. Tilman v. Turner, 1 Ry. & Mo. 142.

(2) May 2, 1811, M. S. See also Banbury peerage case, 2 Selw. N. P. 731—736; and infra, part 2, ch. 4, s. 1.

(3) 4 Campb. 409.

Declarations *post litem motam.*

before any dispute upon it has arisen,) we may reasonably suppose, that he neither stops short, nor goes beyond the limits of truth, in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which in matters of pedigree would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in the case of Stevens v. Moss, I cannot think that Lord Mansfield would have held, that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that according to my experience of the practice (an experience of nearly forty years,) whenever a witness has admitted, that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in the cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value." Then, after referring to the decided cases, the learned Judge added, "The authorities being thus balanced, I think the point must be considered as without any decision, and we must resort to principle and the uniform practice, which has obtained in questions of prescription. Hardships may arise in rejecting declarations made between the commencement of the suit and the time of the trial; but such hardships are not confined to the case of pedigree. In other cases, if witnesses die before the trial of the cause, the party, who relied upon their testimony, must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoid-

ed by a bill to perpetuate testimony. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose courts of justice to the frauds which would be practised upon them if a contrary rule were to prevail. That this is not an imaginary apprehension, will appear from what happened in the Douglas and Anglesea causes; in the first of which, fabricated letters were given in evidence; and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarce an assize or sittings in which witnesses are not produced, who swear in direct contradiction, the one to the other; and it may be feared, that persons, who have as little regard to truth, may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till after their death. We know that passion, prejudice, party, and even good-will, tempt many, who preserve a fair character with the world, to deviate from the truth, in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declarations *post litem motam*, not merely after the commencement of the law-suit, but *after the dispute has arisen* (that is the primary meaning of the word *lis*,) are evidently more likely to mislead the jury, than to direct them to a right conclusion, and, therefore, ought not to be received in evidence. I am likewise of opinion, that no deposition can be received in evidence as a declaration, to prove a fact which it was the object of that deposition to establish. A deposition is the answer of the witness to such interrogatories as it is thought expedient to put to him, to establish certain facts which the plaintiff alleges, and on which the case depends. Consequently, a deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination; and on that account, all admit, that, against a stranger, it cannot be received in evidence as a deposition. How then shall it be received as a declaration? In that case, the circumstance of its being upon oath cannot be regarded. To consider it a declaration on oath, would be to receive it as a deposition. As a declaration, it is still subject to the same vice and infirmity, of being an answer to particular

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Declarations *post litem motam.*

questions artfully put, with an interested view, by one party behind the back of the other. All the objections, on which it is allowed that this document cannot be received as a deposition, apply, with at least equal strength, to receiving it as a declaration."

Award.

In a later case also, at *nisi prius*, where the question was, whether the occupier of a particular farm was liable to the repair of a public road, and to prove the affirmative, an award was produced (which had been made some years before, when the same question was the subject of dispute between a former occupier, and the township where the lands were situated,) this evidence was rejected as inadmissible; on the ground, that the account, which the deceased witnesses might have given to the arbitrator on that occasion, could not have been received, as the declarations were made *post litem motam*, and that the opinion of the arbitrator, formed upon such testimony, could not be entitled to more credit. (1)

Custom.

The same principle applies equally to depositions relating to manorial customs; which therefore are not admissible in evidence, when precisely the same custom, as is the subject-matter of the existing suit, was contested in the former suit, in which the depositions were made. But where the two suits are not upon the same custom, the depositions, taken in the former suit, are not liable to objection, as being made *post litem motam;* and, where the former suit is very ancient, it will be unnecessary to prove the extrinsic evidence, that the witnesses, who made the depositions, were in the situation in which they profess to stand, or that they had the means of becoming acquainted with the customs of the manor. A question of this kind lately occurred in the case of Freeman v. Phillipps;(2) where depositions in an ancient suit, as to a copyhold custom, were adjudged to be admissible. The former suit was instituted against the lord of a manor, by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life, or lives to change or fill up his lives, *paying to the lord a reasonable fine*

Depositions in a former suit upon a different custom.

Former suit.

(1) R. v. Cotton, 3 Campb. 444, before Dampier, J.

(2) 4 Maule & Selw. 486.

to be set up by the lord or his steward. The subsequent suit was an action by a copyholder against a lord of the same manor, and the question was, whether there existed in the manor such a custom, as the plaintiff claimed, in respect of copyholds granted for two lives, that the surviving life should renew, *paying to the lord such fine as should be set by the homage equal to two years' improved value.* It was not proved, farther than by the record itself, that the litigating parties in the former suit were (as they claimed to be) lord and copyholder, or that the persons making the depositions were such as they represented themselves to be in the depositions. These depositions were offered in evidence on behalf of the defendant, as showing, that, at the time of the former suit at least, no such custom as the present was ever set up, but that the custom, which was applicable to all copyholders for lives (and, therefore, to copyholders for two lives,) was, that the copyholder should renew on payment of a fine to be set by the lord or steward, without mentioning any thing of the intervention of the homage or jury, and that such intervention was not an ingredient in the custom. The objections against the reading of the depositions were, first, that the former suit was *res inter alios acta:* and, secondly, that the depositions were not admissible as declarations, having been made *post litem motam.* But the Court of King's Bench determined, that the depositions had been properly admitted in evidence.

Declarations *post litem motam.*

Second suit.

Objection.

With respect to the first objection, Lord Ellenborough C. J. said, "Considering these depositions as made in a suit, which may now be said to be lost in remote antiquity, we should give this record but little effect, if we did not attribute to it verity in many of the particular matters which it contains, such as, that the parties litigant were clothed with the rights in which they profess to stand, and were agitating the claim put forward on the record. It appears, then, that in 1693 a copyholder of this manor, or a person claiming at least to be a copyholder, was engaged in a suit with the lord, and in the course of that suit produced persons, who appear to have stood *in pari jure* or *eodem jure*, and who made their depositions in support of the claim. These depositions I consider to be evidence, as being made by persons standing *in pari jure;* and so they have been considered at all times. They furnish evidence not only against the parties making them, but against all persons

Parties *in pari jure.*

On question of public right, or custom.

Different custom.

standing in the same relation." And, as to the second objection, Mr. Justice Le Blanc said,—"One answer to the objection (of their having been made *post litem motam*) is this, that, treating the depositions as hearsay evidence only, still they are not to be considered as made *post litem motam*, because the same thing is not in controversy now, that was in controversy in the former suit; the two customs, which gave rise to the two suits, are different. And the strong ground of observation, which arises upon these depositions, is, not that they are evidence of any particular thing, which the witnesses have affirmed, but that, at a time when a dispute existed between the lord and his copyholder concerning the copyholder's right to renew on certain terms, it was never insisted upon as a term, that the fine should be assessed by the jury. I do not see how, in this point of view, it can be said, that this was not evidence applicable to the issue: and it seems also to me to stand clear of objection, either on the ground of its being a declaration made after the commencement of a suit touching the matter in question, or on the other ground, that we ought to look for evidence *aliunde* to make it admissible." (*n*)

Thirdly, as to the admissibility of hearsay evidence on questions of public rights, customs, boundaries, &c.

Hearsay as to public rights.

1. In questions concerning public rights, common reputation is admitted in evidence. Such rights, being matters of public notoriety and of great local importance, become a continual subject of discussion in the neighborhood, where all have the same means of information and the same interest to ascertain the claim. (1) If a question should be raised, whether a corporation has a prescriptive right to collect tolls on a public navigation, it would be good evidence to show, that deceased persons have been heard to acknowledge the right, and to declare that they had been so informed by their predecessors. The same reason applies, in a less degree, to questions respecting general customs, which concern parishes or manors, or the inhabitants of towns and other places. (2) In such cases, general reputation is some

(1) Morewood v. Wood, 14 East, 329. See Weeks v. Sparke, 1 Maule & Selw. 679, 685.

(2) 14 East, 327.

(*n*) See Note 474, p. 625.

evidence of a right beyond the memory of living witnesses, and thus tends to support the modern usage. (*o*)

On question of public right, or custom.

2. In questions upon a boundary between parishes or manors, (1) or on a customary right, (2) (*p*) or on parochial or manorial customs, (2) declarations made by deceased persons, who from their situation had the means of knowledge, and no interest to misrepresent, are admissible in evidence.

Hearsay as to boundaries, customs, &c.

Perambulations are evidence of the extent of a particular parish or manor; since it may be inferred, that those who perambulated believed the line of their perambulation to be the boundary of the district, and such acts are in some measure an exercise of the right. (3) Such evidence has been admitted from analogy to cases of public rights, in which it is clearly established, that reputation is admissible. (*q*)

Perambulations.

A right of common by custom is, strictly speaking, a private right; but it is also a general right, and therefore (so far as regards the admissibility of this species of evidence) has been considered as public, because it affects a large number of occupiers within a district. But it is to be observed, the evidence is to be confined to what such old persons have said, as were in a situation to know what the rights were: and before a customary right can be proved by such evidence, a foundation ought to be laid by showing an exercise of the right, or acts of enjoyment within the period of living memory; it is the exercise of the right that lets in the evidence of reputation. (4) Where, indeed, the subject-matter does not admit of acts of enjoyment or the exercise of a right, there the opinion of the place is of itself admissible in evidence; as, on a question of parochiality, proof of reputation, unaccompanied by evidence of acts done, is clearly admissible.

Common.

(1) Nichols v. Parker, 14 East, 331. 1 Maule & Selw. 81.

(2) Denn v. Spray, 1 T. R. 466. Beebee v. Parker, 5 T. R. 26, 31. Chapman v. Smith, 3 Gwill. 854. 2 Ves. 512, S. C. Doe d. Allason v. Sisson, 12 East, 62. Morewood v. Wood, 14 East, 327, n. Nichols v. Parker, ib. 331, n. And see Weeks v. Sparke, 1 Maule & Selw. 679, 684, 686. Harwood v. Sims, 1 Wightw. 112. Freeman v. Phillipps, supra, p. 246.

(3) 1 Maule & Selw. 687, 689.

(4) 1 Maule & Selw. 689, 690. 12 East, 65. 14 East, 330.

(*o*) See Note 475, p. 626. (*p*) See Note 476, p. 628. (*q*) See Note 477, p. 628.

On question of public right, or custom.

Post litem motam.

Declarations as to boundaries or customs, &c. made *post litem motam*, that is, after the very same point or question has become the subject of controversy, are not admissible. (1) But, unless there should appear to be a controversy as to the same precise point, it will not be enough, for the purpose of excluding the declarations of deceased persons, to show, that they claimed under the same custom. This kind of evidence has been received, on a question of parochial modus, though the deceased was a parishioner, and occupier of lands; (2) so also, on a question of parochial or manorial boundary, although the persons who had been heard to speak of the boundary were parishoners, and claimed rights of common on the very wastes which their declarations had a tendency to enlarge. (3)

Modus.

Declarations of occupiers.

Tradition of particular fact.

Although, on a question of boundary or custom, the general opinion of the place is evidence of the general right, yet the tradition of a particular fact (as, that turf was dug, or a post put down in a particular spot, &c.) said to have been done in the exercise of that right, will not be evidence. (4) For the fact, which is the subject of tradition, may have been done under a licence from the very persons against whom, or against whose representatives, the right is afterwards claimed; and, in general, single facts are so frequently misrepresented, or misreported, either from intention or from ignorance, and the various circumstances, which have accompanied a fact, and which may be essentially characteristic, are often so little known, or, if known, are so likely to pass unobserved, and to be forgotten in the course of time, that no credit can safely be given to such a tradition. Thus, on a question of parochial modus, evidence that a particular person, since deceased, paid a certain sum in lieu of tithes, would not be admissible; but if the witness says, he has heard from old inhabitants, that so much per acre was always paid in lieu of the tithes, or that it had always been the custom to make such payments, that will be good evidence; for

Modus.

(1) 11 Price, 180. Vide supra, p. 245, on this subject.

(2) Harwood v. Sims, 1 Wightw. 112. Moseley v. Davy, 11 Price, 162, 180. Deade v. Hancock, 13 Price, 236.

(3) Nichols v. Parker, 14 East, 331, tried before Le Blanc, J. 1805.

(4) 3 T. R. 709. 5 T. R. 123. 14 East, 330, 331. 1 Maule & Selw. 687. Chatfield v. Fryer, 1 Price, 253. Garnons v. Barnard, 1 Anstr. 298.

it does not consist of hearsay of a particular fact, but comes within the general rule of evidence of reputation. (1) And, in questions of pedigree, as the reputation must necessarily proceed on particular facts, such as marriages, births, and the like, the hearsay of the family respecting these particular facts, from the necessity of the case, is not excluded. (2)

On question of prescriptive right.

Pedigree.

With respect to the admissibility of common reputation, as evidence of prescriptive rights strictly private, there has been considerable doubt. In one of the latest cases on this subject, (3) where, on a motion for a new trial, the question was, whether such evidence ought to have been received, as evidence of a prescriptive right of digging stones on a waste, the Court of King's Bench was equally divided. A book of authority lays it down broadly, that "in questions of prescription, it is allowable to give hearsay evidence, in order to prove general reputation; and that, therefore, where the issue was on a right of way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was acknowledged." (4) But, on the other side, there are many great authorities against receiving this kind of evidence. (5) And there appears to be good reason for the distinction. For where individuals claim merely a private right, other people have not the same means of knowing it, nor, if they had, would they have the same interest to examine it. How, for instance, can the common belief among the inhabitants of a parish supply any kind of information, on a question of right of way claimed by an individual over a particular field ?(6) In such cases, common reputation appears to

Hearsay as to prescriptive rights.

Not evidence.

(1) Harwood v. Sims, 1 Wightw. 112. Adams v. Evans, 4 Price, 20.

(2) 4 Campb. 416.

(3) Morewood v. Wood, 14 East, 327. Lord Kenyon C. J. and Ashhurst J. against the evidence; Buller J. and Grose J. for it.

(4) Bull. N. P. 295. And see the opinions of Buller J. and Grose J. in Morewood v. Wood, 14 East, 330, n. 3 T. R. 759. In Webb v. Petts, Noy, 44, it is said, the court agreed that proof by hearsay, of a modus for a particular farm was admissible. See also Price v. Littlewood, 3 Campb. 288, stated infra.

(5) Lord Kenyon in Reed v. Jackson, 1 East, 357. Lord Kenyon and Ashhurst, J. in Morewood v. Wood, 14 East, 329. Lord Kenyon in Withnell v. Gartham, 1 Esp. N. P. C. 324. See also Clothier v. Chapman, 14 East, 331, n. Didsbury v. Thomas, 14 East, 323. Barnes v. Mawson, 1 Maule & Selw. 81. Blacket v. Lowes, 2 Maule & Selw. 494. Outram v. Morewood, 5 T. R. 123.

(6) See 1 Maule & Selw. 691.

Old leases, rent-rolls, &c.

give no satisfactory information, and to be inapplicable to the point in issue.*

Prescription affecting general right.

In the case of Weeks v. Sparke, (1) one of the latest cases on this subject, which was an action for a trespass on the plaintiff's close, parcel of a common, &c. the defendant justified for a prescriptive right of common at all times over the place, &c. and the plaintiff in his replication prescribed to use the place for tillage, &c. qualifying the defendant's general right; to support this prescriptive right of tillage, the plaintiff offered evidence of reputation, which was received at the trial; and the Court of King's Bench were of opinion, that it had been properly admitted, on the ground that the right claimed by the plaintiff, although claimed by prescription, yet was an abridgment of the general right of common over the waste, and affected a large number of occupiers within the district.

Fourthly, as to the admissibility of old leases, rent-rolls, and surveys.

Old leases, rent-rolls.

Old leases and old rent-rolls have, in certain cases, been received in evidence, in favor of a party claiming under the lessors. (2) On a question, whether certain lands, which had been

(1) Maule & Selw. 679. See City of London v. Clerke, Carth. 181.
(2) Newburgh v. Newburgh, Vin. Abr. tit. Evid. T. b. 43. 3 Brown, Parl. Cases, 553. By Heath J. in 1 Campb. 309.

* It has been said, that in the case of the Bishop of Meath v. Lord Belfield (*a*) in a *quare impedit*, after the plaintiff had given in evidence an entry, in the register of the diocese, of the institution of one K., (in which entry there was a blank, where the patron's name is usually inserted,) parol evidence of the general reputation of the country was offered, that K. was in by the presentation of one, under whom Lord Belfield claimed; and that upon a bill of exceptions, this evidence was adjudged to be admissible, on the ground that a presentation may be by parol, and what commences by parol may be transmitted to posterity by parol, and that this creates a general reputation. But Lord Kenyon, adverting to this case, in the case of the King v. Eriswell, (*b*) said, he admitted, that a presentation might be by parol, and might be proved by parol, that is, by a witness who was present and heard it: but he denied, that, in such a case, common reputation could be given in evidence. If it can, he added, why might not such evidence decide titles to estates, at least before the statute of frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom?

(*a*) Bull. N. P. 295, and cited by Buller J. in Rex v. Eriswell, 3 T. R. 719, S. C. reported 1 Wils. 215.
(*b*) 3 T. R. 723. Tellard v. Shebbeare, 2 Wils. 366.

approved from a waste, were subject to a right of common, several counterparts of old leases, kept among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from any such charge, were allowed to be evidence for the plaintiff, who claimed under the lord of the manor, against the defendant in trespass, who justified for common of pasture; they were admissible in evidence to prove this fact, that, at the time of their respective dates, the lord of the manor granted the land free from common; and though possession under the leases was not shown, yet that was not an objection against the admission of the evidence in this case, as the leases were so old, that no person could speak to possession under them. (1)

Old leases, rent-rolls, &c.

Counterparts of leases.

Where the question was whether the plaintiffs were entitled to a prescriptive right of exclusive fishery in a navigable river, which they claimed under the lords of the manor, they were allowed to give in evidence old entries of licences on the court-rolls of the manor, stating that the lords of the manor had the several fishery, and had granted the liberty of fishing for certain rents: nor was it thought necessary to prove payment under these licences, as they were of such an ancient date, that evidence of payment could not reasonably be expected. (2) The old licences were, therefore, admitted: but it was added, that they would not be entitled to any weight, unless payment under similar licences could be proved in later times, or that the lords of the manor had exercised other acts of ownership, which have been acquiesced in.

Court-rolls.

Licences.

Entries by a deceased person, of the receipt of rent for particular lands, would not be evidence for a party claiming under the deceased, to show that the lands belonged to his ancestor. Thus, in the case of Outram v. Morewood, (3) (where one of the points to be established was, whether certain lands, described in ancient title deeds, were the same, for which certain rents had been at several times paid,) the Court of King's Bench determin-

Entries of receipt of rent.

(1) Clarkson v. Woodhouse, 2 T. R. 412, (a).

(2) Rogers and others v. Allen, 1 Campb. 309, before Heath, J.

(3) 5 T. R. 123. And see Lord Pomfret v. Smith, 7 Brown, P. C., 169, Toml. ed. 5 T. R. 413, n

Old leases, rent rolls, &c.

ed, that entries, made by a deceased person under whom the defendant claimed, acknowledging the receipt of rent for the premises in question, were not admissible evidence for the defendant. Lord Kenyon on that occasion said, " This is distinguishable from all the cases cited. In those, something was produced in respect of the interest of the party; and what the party did or said may be evidence against himself. But here, the entry was a mere private memorandum, to remind the person that he had received the rent, and cannot be admitted to decide the right between these parties. Evidence of this kind can only be admitted to restrain, not to advance the interest of the party who makes it. What a man does in his closet ought not to affect the rights of third persons. There is only one instance in which this is allowed, namely, the books of an incumbent respecting his tithes. But that has been always considered an excepted case." " The general rule," said Lord Hardwicke, (1) in the case of Glyn v. The Bank of England, " is, that a man cannot make evidence for himself. What he writes or says for himself cannot be evidence of his right, and consequently cannot be for his representative claiming in his right and place. I will not say (added Lord Hardwicke) how length of time may vary it; but otherwise it cannot be, any more than for himself."

Survey of manor.

A survey of a manor or estate, made by the owner, is not evidence against a stranger, in favor of a succeeding owner, that particular lands are parcel of the estate. (2) But a survey, which was delivered by the owner to a purchaser of part of his estate, would be evidence against such former owner and against a purchaser of the other part; as, in the case of Bridgman v. Jennings, (3) where Lord Holt ruled, that if A. be seised of the manors of B. and C., and during his seisin of both he causes a survey to be taken of the manor of B., and afterwards the manor of B. is conveyed to E., and afterwards there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence: but it would be otherwise, said Lord Holt, if the two manors had not

(1) 2 Ves. 43. Rex v. Debenham, 2 Barn. & Ald. 186.
(2) Anon. 1 Str. 95.
(3) 1 Ld. Raym. 734., Gilb. Ev. 70. And see Davies v. Pierce, 2 T. R. 53. Allott v. Wilkinson, 4 Gwill. 1585.

been in the hands of the same person, at the time when the survey was taken. A survey, then, which has been made by a former owner of the estate, is not evidence of the locality or identity of land against any person, who was a mere stranger to the survey. (*r*) Against interest.

Fifthly, as to the admissibility of declarations against interest.

The declarations or statements of deceased persons have been admitted, in many cases, where they appear to be made against their interest; as, entries in their books, charging themselves with the receipt of money on the account of a third person, (1) or acknowledging the payment of money due to themselves. (2) In either case, the entry is to their immediate prejudice, and evidence of the fact, in consideration of which the money is said to have been received or paid. "The principle is, that the entry is made by an individual conusant of a fact, at a time when it was not in dispute, having no interest to make a false entry, and making one tending to charge himself." (3) Declarations against interest.

Where the point in issue was, whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons in satisfaction of trespasses committed on the waste, were admitted in evidence, to show that the right to the soil was in his master, under whom the plaintiff claimed. (4) By steward.

Rentals, in which a deceased bailiff or receiver charges himself with specified sums, are evidence to show for what particular tenure, or in what right the money was received. (5) Ancient documents in the possession of an ecclesiastical corporation, purporting to be accounts furnished by some of their members, employed to By collector.

(1) Barry v. Bebbington, 4 T. R. 515. Harpur v. Brooke, 3 Woodeson, Lect. 332. Stead v. Heaton, 4 T. R. 669.

(2) Warren v. Grenville, 2 Str. 1129, commented on by Lord Mansfield in Brydges v. Duchess of Chandos, 2 Burr. 1072, and by Lord Ellenborough in Higham v. Ridgway, 10 East, 118. Doe dem. Reece and others v. Robson and another, 15 East, 33. Bullen v. Michell, 2 Price, 413, 437.

(3) By Sir T. Plumer, in Short v. Lee, 2 Jac. & Walk. 475.

(4) Barry v. Bibbington, 4 T. R. 515.

(5) Harpur v. Brooke, 2 Woodeson's Lect. 332. Vin. Ab. tit. Evidence, (A. b. 15,) 13. Bullen v. Michell, 2 Price, 413.

(*r*) See Note 478, p. 636.

Against interest.

collect the tithes of a rectory belonging to the corporation, are admissible in evidence in a suit by their lessee. (1) An entry in the book of a land-tax collector, stating a rate upon a person, and payment of the rate, is evidence of that person's occupation. (2)

Bill of lading.

A bill of lading, signed by a deceased master of a vessel, for goods to be delivered to a consignee, is evidence of property in the consignee, not only against the master, but also, as it seems, in an action of trover for the goods against a third person. (3)

Charge for work paid.

A written memorandum by a deceased man-midwife, stating that he had delivered a woman of child on a certain day, and referring to his leger, in which a charge for his attendance was marked as paid, was thought by the Court of King's Bench to have been properly received in evidence, upon an issue as to the child's age. (4) This entry was made by a person, who, so far from having an interest to make it, had an interest the other way: for it appeared distinctly from other evidence, that the work charged was actually done; and the discharge in the book repels the claim which he would otherwise have had. It appears, therefore, to be a general principle, that if a party, who has knowledge of the fact, makes an entry of it, whereby he charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence. (5) (*s*)

By owner of estate.

Upon the same principle, in a late case, in an action of ejectment by the first tenant in tail under a settlement (by which an estate was limited to A. for life, remainder to B. for life, remainder to C. his eldest son, for life, remainder to C.'s eldest son in tail, &c. with a power to the tenants for life to grant leases on condition of reserving the ancient rent,) against the defendant who claimed as lessee of C., to recover a part of the estate, which, as the lessor of the plaintiff complained, had been demised for less than the ancient rent, the Court of King's Bench held, that a letter addressed to B.

(1) Short v. Lee, 2 Jac. & Walk. 464.
(2) Doe dem. Smith v. Cartwright, 1 Ry. & Mo. 62, by Abbott C. J.
(3) Haddow v. Parry, 3 Taunt. 305.
(4) Higham v. Ridgway, 10 East, 109. 110. 2 Price, 413.
(5) Doe dem. Reece v. Robson, 15 East, 35.

(*s*) See Note 479, p. 639.

by one intimately acquainted with the property, purporting to be a particular account of the ancient rents at that time, and recognized as such by B., and preserved by the successive owners of the estate, ought to have been received at the trial, as evidence of the ancient reserved rent against C. (a succeeding tenant for life, subject to the restrictions of the same power) and also against the defendant claiming under C. This old paper, so accredited and adopted, was considered to be equivalent to a declaration by B. himself. Lord Ellenborough, in delivering the judgment of the court, said, "The contents of the paper were adverse to the title of the person who had possession of it, by diminishing the interest in the fine on renewal, in the same proportion as it raised the rent to be reserved. Then at such a distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury." (1) (*t*) Against interest.

Where the question was, whether some horses, which had been taken by the defendant under a heriot custom, belonged to the plaintiff or to one A. B., a deceased tenant of the defendant, declarations by A. B. were offered in evidence for the purpose of proving, that the horses belonged to the plaintiff before A. B.'s death, in which declarations A. B. stated that he had given up his farm and all his stock to the plaintiff. This evidence was rejected at the trial; held that the declarations ought to have been admitted, since they were against the interest of the person who made them, and might have been given in evidence against him in his life-time, if the plaintiff had brought an action for the horses. (2) (*u*) By owner of property.

Upon the same principle, a paper signed by many deceased copyholders of a manor, importing what was the general right By copyholder.

(1) Roe d. Brune v. Rawlings, 7 East, 279, 290. See also the following cases, in which declarations of deceased persons, against their interest, were received in evidence; Beggalley v. Jones, 1 Campb. 367; Morewood v. Wood, 14 East, 328; Doe d. Reece v. Robson, 15 East, 33; Price v. Littlewood, 3 Campb. 288, stated infra. And see Lady Dartmouth v. Roberts, 16 East, 334; Hodgson v. Fullarton, 4 Taunt. 787; Wadley v. Bailiss, 5 Taunt. 752; Searle v. Lord Barrington, stated in vol. 2.

(2) Ivat v. Finch, 1 Taunt. Rep. 141.

(*t*) See Note 480, p. 643. (*u*) See Note 481, p. 644.

Against interest.

of common in each copyholder, and agreeing to restrict it, is evidence of reputation even against other copyholders not claiming under those who signed it. (1) A declaration by the owner or occupier of adjoining land, that his neighbor's land extends to such a spot, accompanying an act of forbearance to go beyond the spot for that reason, (or without such act, if he speaks against his interest,) is evidence, that the land extends so far. (2) (*v*) And

By occupier of land.

the declaration of a deceased occupier of land, that he rented it under a certain person, is evidence of that person's seisin; (3) it is evidence against a party claiming under the deceased, as his heir at law, to explain the nature of the occupation, and to show that it was not adverse. (4) (*w*)

Such admissions or declarations against interest appear to be evidence upon the same principle as the acts of a party against his interest; they differ in degree and in their effect, rather than in their nature. An act of forbearance on one side is an admission of right on the other; and proof of the exercise of a right, which has been acquiesced in, is still stronger evidence that the right exists. It is the constant practice to receive such evidence on questions concerning tolls, rights of way, freehold in wastes, and other cases of the same kind. (5) (*x*)

The case of Goss v. Watlington (6) affords another example, as to the admissibility of written entries made by a person, since deceased. This was an action against a surety of A. B. deceased, on a bond conditioned for the performance of duty by A. B., as collector of rates, &c., and for his delivering up to his employer all books and accounts, entrusted to his care as such collector. For the purpose of proving the receipts of money by the collector, certain books were produced, which had been delivered to him from his predecessor, and which, on the death of A. B., were delivered over to his successor: these books contained entries of persons rated, and, opposite the names, the amount of the respective rates; many of the names

By principal as against surety.

(1) Chapman v. Cowlan, 13 East, 10.

(2) Sir T. Stanley v. White, 14 East, 332, 339, 341.

(3) Uncle v. Watson 4 Taunt. 16. Doe dem. Baggalley v. Jones, 1 Campb. 367. Doe dem. Human v. Pettett, 5 Barn. & Ald. 223.

(4) 5 Barn. & Ald. 223.

(5) 1 Str. 659. 14 East, 342. 1 Campb. 310. 5 Taunt. 752.

(6) 3 Brod. & Bing. 132.

(*v*) See Note 482, p. 669. (*w*) See Note 483, p. 669. (*x*) See Note 484 p. 669.

were ticked off, to show that the collector had received the sum assessed. Receipts also, signed by the deceased collector, for money paid to him in his official capacity, were produced. On the first point, the Court of Common Pleas were of opinion, that the entries made by the deceased collector, charging himself with the receipt of money, and made by him in the public books of his office, for the faithful delivery of which books the defendant was surety, were admissible in evidence against the surety. Upon the second point, namely, the admissibility of the receipts, the Court thought there was not enough, in the circumstances of the case, to admit the receipts in evidence against the defendant. (*y*)

Against interest.

The memorandum or entry, before it can be received in evidence, must be proved to be authentic; as, by showing it to be the hand-writing of the deceased person, who knew the fact there stated, or that it was signed by him; (1) or, if signed by another, that it was made by his order, or afterwards acknowledged by him. (*z*)

Proof of entry.

When a written entry or document is offered in evidence as the statement of a person in a particular capacity (as, collector of tithes, steward, collector of taxes,) it should be proved, that the person was in that capacity, and invested with that character. Unless this fact is previously ascertained, the proposed writing is not admissible. (2) The possession, out of which the document comes, is always to be regarded, and the document itself may often supply important internal evidence of its being authentic. (3) (*a*)

In all the cases which have been mentioned on this subject, the person, who made the entry or declaration in question, was deceased at the time of the trial; if the rule were not confined to such cases, there would be great danger of collusion. It has, therefore, been held, that such evidence is not admissible, where

Proof of death.

(1) 4 T. R. 515, 516. Jones v. Waller, 3 Gwill. 847. Yate v. Leigh, 3 Gwill. 861.

(2) Short v. Lee, 2 Jac. & Walk. 464, 467.

(3) Doe d. Webber v. Lord G. Thynne, 10 East, 206, 4 T. R. 516.

(*y*) See Note 485, p. 669. (*z*) See note 486, p. 673. (*a*) See Note 487, p. 673.

Rector's or Vicar's book.

the person is incapable of attending from illness. (1) (*b*) This is the rule respecting the proof of modern entries in private books. But entries in the public books of public companies are admitted without the proof of the officer who made them. (2)

Sixthly, as to the admissibility of the books of deceased rectors or vicars.

Rector's and Vicar's books.

Entries made by a deceased rector or vicar, as to the receipt of ecclesiastical dues, have been in several cases admitted as evidence for his successor; (3) because, it is said, he had no interest to misstate the fact in making an entry which could not possibly be evidence for himself. (4) "This," as Lord Hardwicke once said, (5) "is going a great way, but has been allowed, because the parson knows, that his entry cannot benefit either himself or his representative, who has nothing to do with the living: and it is not to be presumed (he added,) that the parson would make false entries for his successor, who stands indifferent to him."*

The cases have even gone still further: and similar entries, made by deceased impropriate rectors, have been received as evidence for their successors, although objected to as coming

(1) Harrison v. Blades, 3 Campb. 457. Manby v. Curtis, 1 Price, 282, 235. Cooper v. Marsden, 1 Esp. N. P. C. 2, stated infra.

(2) Hodgson v. Fullarton, 4 Taunt. 787, by Mansfield Ch. J. The officer was prevented from attending, by illness. This point was not suggested afterwards, among the grounds for entering a nonsuit.

(3) Le Gross v. Lovemoor, 2 Gwill. 529. Lord Arundel's case, 2 Gwill. 620 Perigal v. Nicholson, Wightw. 63. Walter v. Holman, 4 Price, 171. Parsons v. Bellamy, 4 Price, 190. Armstrong v. Hewitt, 4 Price, 218. In this last case, the vicar's book was produced from the parish-chest; and it was said, that there were two other legitimate depositories for such books, besides this of the parish-chest, namely, the bishop's registry, and the registry of the archdeacon of the diocese.

(4) 7 East, 290. 1 Wightwick, 63.

(5) 2 Ves. 43.

* Such evidence is said to have been refused in Le Gross v. Lovemoor, 2 Gwill. 527; has been mentioned as a singular exception by Lord Kenyon in Outram v. Morewood, 5 T. R. 123; was disapproved of by Mr. Baron Wood in Perigal v. Nicholson, 1 Wightw. Rep. 63, and in Bullen v. Michel, 2 Price, 436; also by Price B. in Woodnoth v. Ld. Cobham, 2 Gwill. 653. King, C. J., in a case before him, in 1719, said, this evidence had been received *per cursum Scaccarii*, though he could not give a reason for it; Vin. Ab. Ev. (T. b. 73.) Vide supra, p. 230, as to the general objections, to which hearsay evidence is liable; and Outram v. Morewood, supra, p. 251, n. (5.)

(*b*) See Note 488, p. 673.

from the owners of the inheritance. (1) Entries of tithes received in the books of an ecclesiastical aggregate corporation, to whom a rectory belonged, are evidence for their successors: the admissibility of the entries does not appear to be affected by the consideration, whether the corporation is sole or aggregate. (2) Rector's or Vicar's book.

In a case where a question arose between an impropriate rector and a vicar respecting agistment tithe, the Court of Exchequer held, that the books of a deceased lessee of the rectory, stating the receipt of such tithe, were evidence after the determination of the lease, for the impropriator;(3) and, on the other hand, entries by the steward of a former deceased owner of the estate, containing an account of payments to the vicar in lieu of the tithes of particular lands, have been admitted as evidence for a succeeding owner against the impropriator. (4)

In the late case of Perigal v. Nicholson and others, (5) on a bill for tithes filed by the vicar against the defendants, who insisted upon a modus for hay and agistment, the Court of Exchequer admitted, as evidence for the plaintiff, an entry in the parish register, stating, that various moduses were due from the different townships of the parish for hay only, in which entry the sum total of all the moduses was in the hand-writing of a preceding vicar, but it did not appear by whom the other part of the entry had been made. The majority of the Court held, as the report states, that the entry was admissible, upon the ground that the vicar had no interest beyond his incumbency, and there did not appear to be any dispute at the time, or previously, respecting these tithes; and this entry, by admitting a modus in one article, was in abridgement of the rights of the vicar, and it was the application only which now accidentally became favourable to his successor.

It is essential in such cases, that the rector or vicar, whose books are offered in evidence, should appear to be dead; if not Proof of death.

(1) Anon. case, Bunb. 46. Anon. case, before King C. J., Vin. Ab. Ev. T. b. 73, and T. b. 117, art. 3. See Short v. Lee, 2 Jac. & Walk. 479.

(2) Short v. Lee, 1 Jac. & Walk. 478.

(3) Illingworth v. Leigh, 4 Gwill. 1618.

(4) Woodnoth v. Lord Cobham, 2 Gwill. 653. Bunb. 180, S. C.

(5) Wightw. 63; Wood B. dissenting.

Rector's or Vicar's book.

dead, he must be called to prove the receipt of the sum specified. There have indeed been cases, where, from the circumstance of finding the books of a former vicar in the possession of a succeeding vicar, so far back as between the times of Charles the Second and George the Second, the death of the vicar might be reasonably presumed. The case of Jones v. Waller is an instance, (1) in which the book of a collector of tithes in 1679 was admitted as evidence in 1753, because it was not reasonable to suppose that the collector was then alive. In the late case of Manby v. Curtis, (2) on the other hand, where the receipt purported to have been given in the year 1762, the Court of Exchequer determined, that the death of the person, in whose name the receipt was signed, could not be presumed after a lapse of fifty years, and, as this fact had not been proved, that the document ought not to be received in evidence.

Remarks on such evidence.

The cases, in which a deceased rector's books have been received as evidence, in favour of a succeeding rector against a stranger, appear to be very distinguishable from the cases, before cited, in which the declarations or written entries were made by deceased persons, peculiarly if not exclusively acquainted with the fact. The utmost to be said of these is, that the declarations generally related to old facts, and were made by persons who could not have used them in their own favour; and the same may be said of a great variety of cases, in which the declarations of deceased persons have been uniformly rejected. The objection against hearsay, under which title such entries must be classed, (for, with respect to their admissibility, it is not material, whether the declarations were written or merely spoken,) is, not that the person, who asserted the fact, might have been interested to misrepresent it, but that the assertion was made not under the sanction of an oath, and that the party, against whom the evidence is offered, had no opportunity of questioning the person as to the supposed fact. Here, the declarations were not against the interest of the person who made them, and were produced against a stranger; and further, the rights, sought to be established by such declarations, were in their nature capable of various other kinds of proof.

(1) 3 Gwill. 847.

(2) 1 Price, 225, 229, 235. Mr. Baron Wood dissented. See also the reasoning of Mr. Baron Wood in 2 Price, 436, 437.

Seventhly, as to the admissibility of the books of a tradesman. Tradesman's book.

Entries in the books of a tradesman by his deceased shopman, who therein supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of goods, or of other matter there stated within his knowledge. Thus, in an action of assumpsit, where the usual course of the plaintiff's dealings appeared to be, that the drayman of the plaintiff, who was a brewer, should come every night to the clerk of the brewhouse, and give him an account of the beer delivered out by them, which he set down in a book kept for the purpose, and the draymen signed it; the drayman, who signed the particular entry, offered in evidence, had since died, but his hand-writing was proved; this entry was held to be good evidence of the delivery of the beer, for which the action was brought. (1)

This declaration of the tradesman's servant, of having delivered the goods, is an implied admission, that he received them for that purpose, and would have been evidence against him, in an action for not delivering them according to his instructions. But it is clearly distinguishable from entries in the book of a receiver, who by making a gratuitous charge against himself, knowingly against his own interest, and without any equivalent, repels every supposition of fraud. A disposition to commit fraud would have tempted him to suppress altogether the fact of his having received any thing, or to misrepresent the amount of the sum, but not to misstate the ground or consideration for which it was received; that is, not to mis-state the only fact sought to be established by the proposed evidence. On the other hand, the declaration of the tradesman's servant is offered in evidence to prove the fact of delivery, and as he gives the account not against his own interest, which is some security for the truth of the statement in the other case, the probability of his account being true or false, is neither greater nor less than the probability of his being honest or dishonest, which is nothing more than may be said in every case of hearsay. The circumstance of his thereby acknowledging the receipt Remarks on such evidence.

(1) Price v. Ld. Torrington, 1 Salk. 285; 2 Ld. Raym. 873, S. C. See Pitman v. Madox, 2 Salk. 690; Calvert v. Archbishop of Canterbury, 2 Esp. N. P. C. 645. The entry of a copy of a licence, in a merchant's letter-book, written by a deceased clerk, and proved to be in the usual course of business, was admitted in Hagedorn v. Reid, 3 Campb. 379.

Tradesman's book.

of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say: to have said nothing at all, would, as he must have known, necessarily lead to some inquiry. These considerations may serve to show, how cautiously such declarations by shopmen are to be admitted in evidence, to charge third persons with the receipt of goods: more particularly, as the tradesman may easily be furnished with evidence of delivery, by taking a memorandum from the purchaser, or by requiring some other security.

Entry by shopman.

The entry in the tradesman's book ought to have been made by the shopman: or, if not actually written by him, should at least appear to have been observed by him soon after it was made, so as to enable him to speak to its correctness, and that the entry may be tantamount to one made by the shopman himself. (1)

Shopman to be called.

If the shopman is living, he ought to be produced as a witness, that he may explain the circumstances and dealings, on which the entry was founded. When he is examined, he may use the entry as a memorandum; and the other party, charged with the debt, will then have an opportunity of examining into its correctness. If the person, who made the entry, was employed, as shopman or clerk, to deliver goods, &c. and he is since dead, an entry made by him will be evidence under certain restrictions. But proof of the hand-writing of the clerk, and that he is gone abroad, and is not likely to return, has been held not to be sufficient to make such an *ex parte* memorandum admissible in evidence. (2)

Examples.

In the case of Evans and Lake, (3) a merchant's books were received in evidence under particular circumstances. The question there was, whether certain goods, which had been bought in the name of Mr. Lake, were purchased on his own account, or in trust for Sir Stephen Evans. To prove the latter of these positions, the assignees of Sir Stephen Evans, who were the plaintiffs, first showed, that there was no entry in the books of

(1) Digby v. Stedman, 1 Esp. N. P. C. 327.

(2) Cooper v. Marsden, 1 Esp. N. P. C. 2.

(3) Bull. N. P. 282, 283. and see Cooper v. Marsden, 1 Esp. N. P. C. 1.

Tradesman's book.

Mr. Lake relating to this transaction; they then produced several receipts in the possession of Sir S. Evans for the payment of part of the goods, and on the back of the receipts there was a reference in the hand-writing of Sir Stephen's book-keeper, since deceased, to a certain shop-book of Sir Stephen. Upon this, the question was, whether the book so referred to, in which was an entry for the payment of money for the whole of the goods, should be read. And the court of King's Bench, on a trial at bar, admitted the entry, not only as to the part mentioned in the receipts, but also as to the remainder of the goods then in the hands of Mr. Lake's son. In this case, (which Lord Hardwicke has observed upon, as "new and having gone a great way" (1),) the entry was not offered by the assignees as evidence of payment against the seller of the goods, but as corroborating evidence to show, that, while the books of the other party concerned took no notice whatever of the goods, those of Sir S. Evans, under whom the plaintiffs claimed, treated the goods as bought on his account.

Entry in third person's book.

In another case, where the plaintiff, to prove delivery of wine to the defendant, produced a book belonging to his cooper, since dead, whose name was subscribed to several articles, which it was proposed to read, after proof of the hand-writing, Lord Raymond C. J. would not allow it, saying it differed from Lord Torrington's case. (2) And Lord Kenyon ruled, in the case of Calver v. Archbishop of Canterbury, (3) that, in an action for the hire of a pair of horses, an entry by the plaintiff's servant since dead, stating the terms of the agreement with the defendant, ought not to be admitted. (*c*)

Entry of agreement.

Book open to party for inspection.

In an action by a tavern-keeper, (4) it appeared, that the defendant belonged to a club, which was held at the plaintiff's house, and that in a room, where the club met, a book used regularly to be kept open, in which the plaintiff's servants entered the articles, as they were ordered by the members of the club, who had thereby an opportunity of inspecting and correcting the account. Lord

(1) Glyn v. Bank of England, 2 Ves. 43.

(2) Clerk v. Bedford, Bull. N. P. 282. See Cooper v. Marsden, 1 Esp. N. P. C. 1.

(3) 2 Esp. N. P. C. 646.

(4) Wilkzie v. Adamson, K. B. Sit. after Mich term, 1789, MS.

(*c*) See Note 489, p. 674.

Tradesman's book.

Kenyon admitted the book as evidence of the delivery, though it was not proved that the servants, who made the entry, were dead, nor was their absence accounted for, and only their hand-writing was proved. The daily account in the book was in this case considered as tantamount to a bill delivered and admitted by the defendant. (*d*)

St. 7 J. 1.

The stat. 7 J. 1, c. 12, enacts, that the shop-book of a tradesman shall not be evidence, in any action for wares delivered, or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for the said debt, or shall have brought against him some action, within a year next after the delivery of the wares, or the work done. (1) And the 2d section provides, that nothing in the act shall extend to the mutual trading and merchandize between tradesman and tradesman. At the time of making this act of parliament, there was an opinion growing up, that, after a certain length of time, a man's shop-books would be evidence for him, after the year: to prevent which the act was made. (2) However, the book is not evidence, even within the year, except under particular circumstances. (*e*)

Limitations as to time.

Entry by tradesman.

An entry made by a tradesman himself, stating the delivery of goods, is not evidence for him; but whether made by him or not, it may often serve as a memorandum to refresh the memory of the shopman, and for that purpose may be used by him. (*f*)

Entry by bankrupt.

An entry by a tradesman, stating a debt due from himself to a third person, is manifestly good evidence of the debt, as a statement against his interest; thus, entries by a bankrupt, and an account signed by him before his bankruptcy, charging himself with a balance, are admissible as evidence of the petitioning creditor's debt in an action by the assignees. (3) It is essentially necessary, in such cases, to prove the signing of the account, or the making of the entry, to have been before the act of bankruptcy, and to prove this by extrinsic evidence. (*g*)

Time of making entry.

(1) Sikes v. Marshall, 2 Esp. N. P. C. 705.

(2) By Ld. Hardwicke, 2 Ves 43, 376

(3) Watts v. Thorpe, 1 Campb. 376 Hoare v. Coryton, 4 Taunt. 560.

(*d*) See Note 490, p. 679. (*e*) See Note 491, p. 682. (*f*) See Note 492, p. 701. (*g*) See Note 493, p. 701.

CHAP. VIII.

Of the Examination of Witnesses.

After considering, in the last chapter, what kind of evidence ought to be produced for ascertaining the points in issue, the next subject of inquiry relates to the manner in which witnesses are to be examined.

Examination as to interest.

The ordinary mode of proceeding in the courts of common law, preparatory to the examination of a witness, is to swear (*h*) him in chief, unless an objection should be made to his competency; (*i*) in which case, the practice formerly was to examine him on the voire dire; (*j*) and this was so strictly observed, that, if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest.(1) But in later times, the rule has been to a certain extent relaxed, and now, if it should be discovered in any stage of the trial, before the close of a witness's examination and before his dismissal, that he is interested, his evidence will be rejected. This is as well for the convenience of the Court, as for the purposes of justice. The examination of a witness, to discover whether he has any interest in the cause, is frequently to the same effect as his examination in chief; it therefore saves time, and is more convenient, that the witness should be sworn in chief in the first instance; and if it should afterwards appear, in the progress of the examination, that he is interested, it will then be time to take the objection. (2) (*k*)

Cross-examination as to interest under a will.

This relaxation, however, of the ancient rule, does not extend so far, as to allow the counsel on the cross-examination, to ask the witness every sort of question, which might be proper on the voire dire.(*l*) For example, after an examination in chief, a witness is not to be cross-examined as to the contents of a will, not produced in court, under which it is suggested that he takes some

(1) See Lord Lovat's case, 9 St Tr. 639, 646, 704.
(2) Turner v. Pearte, 1 T. R. 717. Perigal v. Nicholson, 1 Wightw. 64. Stone v. Blackburn, 1 Esp. N. P. C. 37. Beeching v. Gower, Holt, N. P. C. 313.

(*h*) See Note 494, p. 705. (*i*) See Note 495, p. 706. (*j*) See Note 496, p. 706. (*k*) See Note 497, p. 707. (*l*) See Note 498, p. 709.

Examination in chief.

interest, although such questions might be properly asked in an examination on the voire dire. (1) (*m*)

When the witness has been regularly sworn, he is first examined by the party which produces him; after which, the other party is at liberty to cross examine. The examination is in open court, in the presence of the parties, their attornies, and counsel, and before the judge and jury, who have thus an opportunity of observing the understanding, demeanor, and inclination of the witnesses. (*n*)

Separately from the other witnesses.

It may often be advisable to examine witnesses separately, and out of the hearing of each other, with a view to obviate the danger of a concerted story among the witnesses, and to prevent the influence which the account given by one may have upon another.* For this purpose, the court will order witnesses to withdraw; and if any witness, who has been ordered to withdraw, continues in court, in violation of such order, the Court will not afterwards permit him to be examined. (2) But an attorney in the cause, whose attendance is necessary in court, to instruct his counsel, is not within this rule. (3) (*o*)

Leading question.

Leading questions, that is, such as instruct a witness how to answer on material points, (*p*) are not allowed on the examination in chief; (*q*) for, to direct witnesses in their evidence would only serve to strengthen that bias, which they are generally too much disposed to feel, in favor of the party that calls them. The strictest observance of this rule is essential for the discovery of truth, and the due administration of justice. (*r*)

Introductory.

Questions which are intended merely as introductory, and which, whether answered in the affirmative or negative, would not be con-

(1) Howell v. Lock, 2 Campb. 14.
(2) Att. Gen. v. Bulpit, 9 Price, 4.
(3) Pomeroy v. Baddeley, 1 Ry. & Mo. 430.

* By the law of Scotland, this separate examination takes place in all criminal prosecutions. The rule there is, that if a witness has been present in court during the examination of another witness, so as to hear his evidence, he will be rejected. See Hume's Com. on Crim. Law of Scotland, 2 vol. 365. Burnet's Treatise, 467.

(*m*) See Note 499, p. 710. (*n*) See Note 500, p. 710. (*o*) See Note 501, p. 720. (*p*) See Note 502, p. 722. (*q*) See Note 503, p. 723. (*r*) See Note 504, p. 723.

clusive on any of the points in the cause, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked, whether the one defendant has interfered in the business of the other. (1) This is not a leading question: for though he may have interfered, it will not follow, that he has by this alone made himself liable as a partner. Or, if a witness, called to prove the partnership of the plaintiffs, is not able at the moment to specify the several names of the partners, a number of names, containing those of the partners among others, may be suggested to the witness, for the assistance of his memory. (2) (*s*) Leading question.

If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the Court will in its discretion allow the examination in chief to assume something of the form of a cross-examination. Where an issue has been directed, with a power to examine one of the parties, it will be competent to the counsel of the opposite party to cross-examine him; because, as party, he must be considered as necessarily adverse. (3)*(*t*) Unwilling witness.

It is to be considered, how far leading questions are proper, in the examination of a witness in chief, when the object is to prove, that another witness, who has been examined on the opposite side, has, on some former occasion, made a different and contradictory statement. If, for example, a witness on his cross-examination were to deny, that he ever gave a different account of the transaction, or that, in conversing upon the subject with a third person, he used certain words or expressions imputed to him, would it be compe- Leading, preparatory to contradicting a former witness.

(1) Nicholls v. Dowding and another, 1 Starkie, N. P. C. 81, by Lord Ellenborough.

(2) Acerro and others v. Petroni, 1 Starkie, N. P. C. 100.

(3) Clarke v. Saffery, 1 Ry. & Mo. 126.

* The rule adopted by the courts of justice in Scotland, on the subject of leading n witness, appears to be much stricter than in this country. No distinction is allowed, according to their practice, between willing and unwilling witnesses, or between an examination in chief and cross-examination. (*a*)

(*a*) See Burnet on Crim. Law of Scotland, p. 465.

(*s*) See Note 505, p. 724. (*t*) See Note 506, p. 724.

Leading question.

tent to the counsel on the opposite side, in examining that third person in chief as his witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or used such and such expressions? This form of putting the question is certainly not uncommon, and frequently passes without objection. But a very little consideration will show, that such a leading question is irregular. (*u*) For, in the first place, it must evidently be quite unnecessary to lead the witness to such a length; it would be sufficient to lead him up to the subject of the conversation; and, that being done, the most regular course would be, to inquire generally, what the former witness said or what account he gave, relative to the transaction in question, thus leaving him, as in fairness he ought to be left, to the use of his own memory. If the witness has a distinct recollection of the conversation, and of the representation made by the other person, whose account is now disputed, he requires only to have his attention directed to the subject, to enable him to speak what he knows: if he has not that distinct recollection, he is ill-qualified to contradict the other witness, as to the expressions supposed to have been used by him; in other words, he is incompetent for the purpose for which he is called. The plea of necessity, therefore, altogether fails. But the principal objection to such leading questions appears to be, that they suggest the desired answer so broadly and obviously, that a witness of the dullest intellect and weakest memory can hardly fail to take the hint, and may easily shape his evidence, if he is so disposed, as may best serve the interest and wishes of the party who calls him. In effect, the question puts into the mouth of the witness the very words, which he is to echo back either in the affirmative or in the negative; thus supplying a forgetful witness with a false memory, and an artful witness with a prompt and concerted answer. Is there, then, any thing in the nature of this particular case, which ought to exempt it from the general rule applicable to examinations in chief? On the contrary, if there is any case, in which that general rule against leading ought to be strictly maintained, it is the one now under consideration, where a witness is called for the purpose of proving the account, given by another witness, to be inconsistent with some former statement, supposed to have been made by him. Whether the question at issue, between the two witness-

(*u*) See Note 507, p. 726.

es, is a question of credit, or whether it is to be considered rather as a question of mere memory, leading is, in either point of view, equally objectionable. If it is a question of memory, the only fair way of trying it, is by allowing the witness to speak for himself unprompted, as his own memory may suggest. If the question is one of credit, then it is undoubtedly due to the person, whose veracity is impeached, that the contradictory statement, supposed to have been made by him, should be distinctly proved, without the aid of leading, and without any undue influence. Upon the whole, therefore, the most unexceptionable and proper course appears to be, to ask the witness who is called to prove a contradictory statement made by another witness, what that other witness said relative to the transaction in question, and not in the first instance to ask, in the leading form, whether he said so and so, or used such and such expressions: After an answer has been given to such inquiry, it would be proper for the purpose of making the contradiction more complete, to ask whether the former witness has, or has not, used the expressions imputed to him. (1) Leading question.

In the case of Courteen v. Touse, (2) Lord Ellenborough allowed the counsel for the defendant to put a leading question to a witness called by him, in order to contradict a witness who had been called by the plaintiff. In that case, one of the witnesses of the plaintiff, having been cross-examined as to the contents of a letter, received by him from the plaintiff (which letter had been lost,) and having mentioned in his cross-examination some particular expressions as part of the contents, witnesses were called on the part of the defendant, to speak to the contents of the same letter, and Lord Ellenborough allowed the defendant's counsel to ask one of the witnesses, who had first stated all he recollected of the letter, whether it contained the particular words and expressions, as represented by the plaintiff's witness. Here the object of the examination was (not, as in the case above supposed, to show that a former witness had given two diff rent representations of the same transaction,) but to ascertain a material fact in the case by means

(1) See Edmonds v. Walter, 3 Stark. N. P. C. 8.

(2) 1 Campb. 43.

Cross-examination.

of the plaintiff's letter; and as the plaintiff's witness had stated what he conceived to be the language of the letter, and the defendant's witness had, on the other side, given his account of its contents, it then became perfectly reasonable to allow the question, whether the letter contained such expressions, as represented by the witness on the other side, or any to that effect. Lord Ellenborough held, that "after exhausting the witness's memory as to the contents of the letter," (not, however, by leading questions, but by examining him in the regular manner,) "the witness might then be asked, whether it contained a particular passage, recited to him, which had been sworn to on the other side; otherwise it would be impossible ever to come to a direct contradiction."

Cross-examination.

In cross-examinations, the object of which is to sift evidence and try the credibility of the witnesses, a great latitude is allowed in the mode of putting questions.* The rule, however, is still subject to certain limitations. A witness cannot be cross-examined as to any fact, which, if admitted, would be collateral, and wholly irrelevant to the matter in issue, for the purpose of contradicting him by other evidence, in case he should deny the fact, and in this manner to discredit his testimony. (1) And if the witness answer such an irrelevant question, before it is disallowed or withdrawn, evidence cannot afterwards be admitted

Irrelevant question.

(1) Spencely v. de Willot, 7 East, 108.

* Sir William Blackstone has referred, in his Commentaries (B. 3, Ch. 23,) to a well-known passage of Quintilian; in which that most judicious of all the ancient rhetoricians gives some excellent hints on the art of cross-examination. "Primum est, nosse testem. Nam timidus terreri, stultus decipi, iracundus concitari, ambitiosus inflari potest; prudens vero et constans vel, tanquam inimicus et pervicax, dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est: aut aliquo, si continget, urbanè dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpè, qui adversus insectantem pugnassent, modestiâ mitigantur. Omnis autem interrogatio, aut in causâ est, aut extra causam. In causâ, (sicut accusatori præcepimus,) patronus quoque altius, unde nihil suspecti sit, repetiâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorquent. Ejus rei sine dubio nec disciplina ulla in scholis, nec exercitatio traditur: et naturali magis acumine, aut usu, contingit hæc virtus. * * In primis interrogatio debet esse circumspecta; quia multa contra patronos vensutè testis sæpe respondet, eique præcipuè vulgo favetur. Tum verbis quam maximè ex medio sumptis: ut qui rogatur (is autem est sæpius et imperitus) intelligat, aut ne intelligere se negt, quod interrogantis non leve frigus est." Quintil. Inst Orat. lib. v. c. 7.

to contradict his testimony on the collateral matter. (1) Such a course would often produce great confusion and embarrassment. The simplest issue on record might thus branch off into a variety of collateral issues perfectly immaterial. (*v*) Cross-examination.

In the application of this rule of cross-examination, the principal thing to be considered will be, whether the question is irrelevant to the points in issue between the parties. In an action for usury, it would be entirely immaterial and irrelevant, to cross-examine the witness respecting other contracts, supposed to have been made by the defendant, unless the witness had first said, that the contracts were the same; and that was the point in the case of Spencely v. De Willot. (2) To inquire of a witness, in cross-examination, whether he had not attempted to dissuade another witness, examined on the opposite side, from being present at the trial, has been held to be so far immaterial to the issue, that if the witness answer in the negative (namely, that he never made such an attempt,) evidence, to contradict him on that point, would not be admissible. (3) However that may be, it is not irrelevant, on the trial of a prisoner, to cross-examine the witness to this fact, whether in consequence of being charged with robbing the prisoner, he had not said, that he would be revenged upon him; and, if the witness should deny having used such a threat, evidence may be given to contradict him. (4) (*w*) What is relevant.

If a witness is called by a party merely for the purpose of producing a written instrument, belonging to the party, which is to be proved by another witness, he need not be sworn; and if not sworn, he will not be subject to cross-examination. (5) If a witness is sworn, and gives some evidence, (as proving an instrument,) however formal the proof may be, he is to be considered a witness for all purposes; and this, although he may be substantially the real party in the suit, and the party on the record Witness, producing papers and not sworn. Sworn and examined.

(1) Harris v. Tippet, 2 Campb. 638, before Lawrence, J.
(2) 7 East, 108.
(3) Harris v. Tippet, 2 Campb. 637, by Lawrence, J. On the trial of Lord Stafford, proof was admitted, on the part of the prisoner, that Dugdale, one of the witnesses for the prosecution, had endeavoured to suborn witnesses to give false evidence against the prisoner, 7 Howell, St. Tr. 1400.
(4) Yewin's case, 2 Campb. 638. n. before Lawrence, J.
(5) See part 2, ch. 8, s. 2, infra.

(*v*) See Note 508, p. 726. (*w*) See Note 509, p. 726.

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a mere nominal party. (1) If he is sworn, and would be competent to give evidence for the party calling him, the other party will in strictness be entitled to cross-examine him, though he has not been examined in chief. (2) If he would not be competent to give evidence for the party calling him, and is called only to produce a writing in his possession, and on being called is sworn, but gives no evidence in chief, the circumstances of having sworn this incompetent witness without examining him, will not entitle the opposite party to cross-examine. (3) (*x*)

Sworn, and not examined.

Witness, after cross-examination, called by opposite party.

It is reported to have been ruled at nisi prius, that if a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause; so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. (4) In the case referred to, the witness might possibly have shown a strong bias in favour of the first party that called him, and on this account perhaps a greater scope was granted to the adverse party, than is usually allowed. It may happen, on the other hand, that the plaintiff calls a witness unwillingly, and from mere necessity, knowing him to be favourable to the other side: in such a case to allow the defendant, on calling him up afterwards as his own witness, to put leading questions, would be giving him an unreasonable advantage. On the contrary, the Court might perhaps be induced to invest the plaintiff's counsel with some of the powers of cross-examination, at the same time that it would probably oblige the defendant's counsel to treat such a witness strictly as his own, and confine him within the limits of an examination in chief. (*y*)

(1) Morgan v. Bridges, 2 Starkie, N. P. C. 314.

(2) R. v. Brooke, 2 Starkie, N. P. C. 473. Philips v. Eamer, 1 Esp. N. P. C. 337. In Simpson v. Smith and another, (an action for maliciously, and without probable cause, making a charge of felony before a justice, against the plaintiff, and causing him to be apprehended, tried at Nott. Sum Ass. 1822, before Holroyd, J.) the plaintiff's counsel having called upon the justice to produce the information taken by him, which was accordingly produced, was proceeding to prove the information by the justice's clerk; when it was insisted by the defendant's counsel, that, he should be allowed to cross-examine the justice who had produced the information; but Holroyd, J. held, that this could not be done, and that the plaintiff's counsel might proceed to prove the information in the regular manner.

(3) Reed v. James, 1 Stark. N. P. C. 132.

(4) Dickenson v. Shee, 4 Esp. N. P. C. 67.

(*x*) See Note 510, p. 730 (*y*) See Note 511, p. 730.

Cross-examination.

Leading in cross-examination.

Unwilling witness.

Willing.

Leading questions are admitted in the cross-examination of a witness where much larger powers are given to counsel than in the original examination. (*z*) Witnesses, upon the cross-examination, may be led immediately to the point, on which their answers are required. (1) If they betray a zeal against the cross-examining party, and show an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts, or even particular expressions. There can be no danger in leading too much, where the witness is obstinately determined not to follow. On the other hand, instances frequently occur, where the witness is adverse to the party who calls him, and leans strongly to the other side: here there must be, in reason and justice, some restrictions as to the form and manner of cross-examining. It often happens, that a witness in cross-examination waits only for a hint, to shape a favorable answer, and is in effect the witness of the cross-examining party, though technically called the witness of the opposite side. To put strong leading questions to such a witness, without limitation or reserve, is substantially preparing a statement for him, and appears to be inconsistent with justice and a fair trial. (*a*)

An instance of the kind, here described, occurred on the trial of Hardy for high treason. (2) A witness, who was a member of the same corresponding society as the prisoner, having been examined on the part of the prosecution, and having made, on his cross-examination, a favorable representation of the political opinions and designs of the society, was asked, whether some of the members had not used certain expressions on the subject of petitioning; upon which, the Lord Ch. Justice Eyre reminded the counsel, that he could not put the very words into the witness's mouth; that this was contrary to the practice of his court and to his opinion. And on the following day, (3) when the subject occurred again, Mr. Justice Buller refered to the rule laid down by the Chief Justice, as the correct rule of practice; and added, "You may lead a witness upon a cross-examination, to bring him directly to the point as to the answer; but not to go the length, as was

(1) See Hardy's case, 24 Howell's St. Tr 755, by Buller, J.

(2) 24 Howell's St. Tr. 659.

(3) 24 Howell's St. Tr. 755.

(*z*) See Note 512, p. 731. (*a*) See Note 513, p. 731.

Obligation to answer.

attempted yesterday, of putting into the witness's mouth the very words, which he is to echo back again."

Privilege of witness in not answering.

The privilege of witnesses, in not being compellable to answer certain questions, is a subject of some importance. The cases here considered, are those, in which the witness might, by answering, subject himself to a penalty or criminal prosecution, to civil process, or to any kind of forfeiture: and, lastly, where the question put to him is degrading to his character.

1. Where the answer might subject to penalties, &c.

First, a witness cannot be compelled to answer any question, which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. (1) (c) On an indictment for a rape, the woman is not obliged to answer, whether on some former occasion, she had not a criminal connection with other men or with paticular individuals; (2) nor is evidence of such criminal intercourse admissible. (3) On an appeal against an order of bastardy, a person cannot be compelled to acknowledge himself the father of the bastard child: but there is no objection to his being sworn, and, if he chooses, he may confess the fact. (4) In an action for a libel, which was published by the defendant in a voluntary affidavit, sworn extrajudicially before a magistrate, it has been held, that the magistrate's clerk is not bound to answer, whether he wrote the affidavit, and delivered it to the magistrate; because, it is said, the bare copying out of a libel is criminal. (5) An accomplice, who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution,

(1) Sir J. Friend's case, 4 St. Tr. 6, S C. 10 Howell's St. Tr. 1090. Lord Macclesfield's case, 6 St. Tr. 649, S. C. 16 Howell's St. Tr. 1149. R. v. Ld. G. Gordon, 2 Doug 593. Title v. Grevet, 2 Ld Raym. 1038. 16 Ves. jun. 242. Hardy's case, 24 Howell's St. Tr. 720. Trial of De Berenger and others, by Gurney, p. 195. Cates v. Hardacre, 3 Taunt. 424. Parkhurst v. Lowten, 2 Swanst Ch. R. 216. See also 16 C. 2, s. 1, c. 12, s. 4, and Preamb. of st. 46 G. 2, c. 37. Acts of indemnity to witnesses are often passed, to absolve them from penalties and prosecutions, on account of transactions of which they are required to give evidence; such as st. 45 G. 3, c. 126, in the impeachment of Lord Melville; and st. 1, 2 G 4, c. 21, on the inquiry respecting elections at Grampound

(2) Hodgson's case, 1 Russ. & Ry. Cr. C. 211. Dodd v. Norris, 3 Campb. 519.

(3) Hodgson's case, 1 Russ. & Ry. Cr. C. 211.

(4) R. v. St. Mary's, Nottingham, 13 East, 58, n.

(5) Maloney v. Bartley, before Wood, B, 3 Campb. 210 A bill of exceptions was tendered, but afterwards dropped.

(*b*) See Note 514, p 734. (*c*) See Note 515, p 734.

is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; for he is not protected from a prosecution for such offences. (1)(*d*) Obligation to answer.

Secondly, as to the case, where the witness, by answering might subject himself to a civil action, or charge himself with a debt. Considerable doubts have been entertained upon this point; some judges being of opinion, that he is not compellable to answer such questions, and others being of a contrary opinion.* To settle the rule of law on this subject, the stat. 46 G. 3, c. 37, was introduced, which declares, that a witness cannot legally refuse to answer a question, relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever,) on the ground, that the answering of such question may establish, 2. Where the answer might subject to a *civil* suit.

(1) West's case, supra, p. 38, n.

* This subject was much discussed, in the course of the impeachment against Lord Melville, and referred to the Judges for their opinion. The only report which the author has seen, of these proceedings, is that to be found in the sixth volume of the Parliamentary Debates: from which the following brief account is extracted. A bill had been brought into the House of Lords, to indemnify witnesses from criminal prosecutions and civil process, to which they might be exposed by giving evidence. The indemnity from criminal prosecution was agreed to; but some doubts arising with respect to the indemnification from civil process, several questions were referred to the Judges, with the view of ascertaining, whether persons were legally justified in refusing to answer questions, the result of which might subject them to a civil suit. (6 vol. Parl. Deb. p. 167.) Three questions were proposed; the object of the first and second was to ascertain, whether a witness could demur to answer a question, the result of which might render him liable to an action for debt, or to a suit for the recovery of the profits of public money; the object of the third was to ascertain, whether a witness, who, on making a full and fair disclosure, was to be excused from certain debts, could be legally objected to, on the ground of his being interested. (P. 222.) The Lord Ch. Justice Mansfield, who delivered the opinion of the judges, stated, that upon the two first questions they were divided in opinion; and that on the third question they were unanimously of opinion, that a witness, in the situation described, could not be rejected on the ground of interest, since whatever might be offered, on condition of his making a fair and full disclosure, could legally make no difference with respect to his evidence, the witness being bound by his oath, by law, morality, and honour, to declare the truth, the whole truth, and nothing but the truth. (P. 223.) The House of Lords then called upon the Judges to deliver their opinions *seriatim* on the proposed questions. (P. 226, 227.) The Judges accordingly delivered their opinions in order. Four of the Judges (Lord Ch. Justice Mansfield, Grose, J., Rooke, J., and Thompson, J.) were of opinion, that a witness was not compellable to answer any question, the answer to which might subject him to a civil action: the other Judges, together with the Lord Chancellor, and Lord Eldon, were of the contrary opinion. (P. 234, 245.)

(*d*) See Note 516, p. 734.

Obligation to answer.

or tend to establish, that he owes a debt, or is otherwise subject to a civil suit. (*e*)

The right, which the parties to a suit have, to refuse answering any question, is not in any degree affected by this statute; and therefore on a question of settlement, a rated parishoner is not compellable by the adverse parish to give evidence, as he is directly interested as party to the appeal, and does not come within the words or meaning of the act. (1)(*f*)

3. Where the answer might subject to forfeiture.

Thirdly, a witness is privileged from answering any question, the answer to which might subject him to a forfeiture of his estate. The declaratory statute, above referred to, implies that a witness may legally refuse to answer a question, which has a tendency to expose him to a forfeiture of any nature whatsoever. At the time of passing that act, when the general privileges of witnesses were much discussed, it was proposed to insert in the act a proviso, that no mortgagee, or *bona fide* purchaser, or possessor of an estate, should be compelled to answer any question, the answering of which might probably tend to defeat his title, or incur a forfeiture of his estate. This proviso was afterwards withdrawn. However, several of the judges, who on that occasion were of opinion, that the liability to a civil action, or to a pecuniary charge, ought not to exempt a witness from answering questions, yet considered the probability or danger of incurring a forfeiture of estate to be a legal ground of exemption. And it is an established principle in courts of equity, that a party is not bound to answer, so as to subject himself to pains or penalties, or to any kind of punishment, or to any forfeiture of interest. (2)(*g*)

4. Where the answer might degrade the witness's character.

The last case, to be mentioned on this subject, is, where a question is asked, the answer to which has a direct tendency to degrade the witness's character, though it may not subject him to a criminal prosecution. If a witness, for instance, were to be asked, whether he had not suffered some infamous punishment, or if any other question of the same kind were asked, imputing

(1) R. v. Inhabitants of Woburn, 10 East, 395. See 54 G. 3, c. 170, stated supra, p. 72.

(2) The cases upon this subject are collected in Mitford's Treat. on Chan. Pleadings, 157—163.

(*e*) See Note 517, p. 739. (*f*) See Note 518, p. 741. (*g*) See Note 519, p. 741.

guilt to the witness in some past transaction, and not relevant to the matters in issue, would he be compellable to answer. (*h*) The inquiry here made, it is to be observed, relates only to such questions as are not relevant to the matters in issue; for if the transaction, to which the witness is interrogated, form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character. (*i*)

Obligation to answer.

There seems to be no reported case, in which this point has been solemnly determined; and, in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination maintain, that, as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary; and that if a witness may not be questioned as to his character at the moment of trial, the property and even the life of a party must often be endangered.—Those, on the other side, who maintain, that a witness is not compellable to answer such questions, argue to the following effect. They say, the obligation to give evidence arises from the oath, which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these—whether the witness has been in gaol for felony or suffered some infamous punishment, or the like,—cannot form any part of the issue, as appears evident from this consideration, that the party, against whom the witness is called, would not be allowed to prove such particular facts by other witnesses. They argue, further, that it would be an extreme grievance to a witness to be compelled to disclose past transactions of his life, which may have since been forgotten, and to expose his character afresh to evil report, when, perhaps, by his subsequent conduct, he may have recovered the good opinion of the world: that if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question to the disparagement and forfeiture of his character: that in the case of

General reasoning.

(*h*) See Note 520, p. 741. (*i*) See Note 521, p. 742

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accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded to a certain extent, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of the whole truth; but even accomplices are not to be questioned, in their cross-examination, as to the other offences, in which they have not been concerned with the prisoner: (1) and with respect to other witnesses, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time allowing the witness to shelter himself under his privilege of refusing to answer, and, if he refuses, to leave it to the jury to draw their own conclusion as to his motives for such refusal.

Authorities.

Although there appears not to be any express decision on the point, whether a witness is compellable to answer questions degrading to his character, yet several opinions have been pronounced by judges of great authority, from which it may be collected, that the witness is not compellable to answer such questions. They are as follows:

Witness not compellable to answer.

1. In Cook's case, reported in the State Trials, (2) where a question arose, whether a juryman, who had been challenged, might be examined as to his having asserted the guilt of the prisoner before the trial, C. J. Treby said, "You may ask upon the *voir dire*, whether he has any interest in the cause, nor shall we deny you liberty to ask, whether he is qualified according to law by having a freehold of sufficient value; but that you may ask a jury (3) *or witness* every question that will not make him criminous, that is too large. *Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer,* for although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and *if it be an infamous thing, that is enough to preserve a man from being bound to answer.* A pardoned man is not

(1) See West's case, supra, p. 38, n.

(2) 4 St. Tr. 748, S. C. 13 Howell's St. Tr. 334, S. C. 1 Salk. 153.

(3) See also Co. Litt. 158, b.

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guilty: his crime is purged. But merely for the reproach of it, *it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself.* So, *persons have been excused from answering, whether they have been committed to bridewell as pilferers or vagrants, &c.;* yet to be suspected is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."

2. On the trial of Sir John Freind for high treason, (1) a question arose as to the propriety of asking a witness whether he was a Roman Catholic. The Court determined, that the question could not be asked, as the witness might, by his answer, subject himself to several penalties. C. J. Treby, on that occasion, said, "No man is bound to answer any questions, *that will subject him to penalties or to infamy.* If you should ask him, whether he were a deer-stealer, or whether he were a vagabond, or any other thing that will subject him to punishment either by statute or by common law, whether he be guilty of a petty larceny, or the like, the law does not oblige him to answer any such question."

3. In Layer's case, (2) on an indictment for high treason, the prisoner insisted, that a witness should be examined on the *voire doire*, whether he had a promise of pardon, or some other reward, for swearing against him. The point was argued by his counsel, and overruled by the Court. The Lord Ch. J. Pratt said, "You see, the most you can make of it is, that it is an objection to his credit; and if it goes to his credit, must he not be sworn, and his credit left to the jury? He must be examined as a legal witness. But *if this man, under expectation or promise of a pardon, comes here to swear that which is not true, and you would ask him to that, he is not obliged to answer it. Nobody is to discredit himself*, but always to be taken to be innocent, till it appear otherwise. If *they who ask the question, insinuate any thing like that*, (namely, that the witness can give no evidence except what is false,) *it ought to have an an-*

(1) 4 St. Tr. 259, S. C. 11 Howell's St. Tr. 1331. This opinion of Chief Justice Treby was approved of by Lord Ellenborough in the case of R. v. Lewis, 1 Esp. N. P. C. 225.

(2) 6 St. Tr. 259, S. C. 16 Howell's St. Tr. 161.

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swer; but if he has a promise of pardon, if he gives true evidence, it is no objection to his being a witness, or to his credit." And Mr. Justice Fortescue Aland, referring to a case cited, where a similar point was made and overruled, said, "The reason the Court gave, (that it was improper to ask this question on the *voire dire*,) was, that if he had this promise, such promise was made either to speak the truth, or to speak a falsehood; *if it were to give just and true evidence, there was no harm in it; and if it was a promise of pardon for speaking what was not true, the witness was not bound to answer that question.*" (*j*)

The question not illegal.

Whether questions, of such a description, may not be legally asked, is a very different point from that before considered, whether the witness is compellable to answer. It may be just to allow a witness the privilege of not answering in certain cases; but that the party, against whom the witness appears, shall not be allowed to ask the question, and force him to his privilege, is a proposition, which, if carried into practice, might often be attended with dangerous consequences. There are two *nisi prius* decisions, in which it seems to have been held, that a question, the object of which is to degrade the witness's character, cannot be properly asked.* However, there are many other cases, in

* R. v. Lewis, 4 Esp. N. P. C. 225. Macbride v. Macbride, Ib. 242. The case of R. v. Lewis was at a prosecution for an assault. The report states, that the prosecutor, *who was a common informer, and a man of suspicious character*, was asked, in the course of the cross-examination, *whether he had not been in the house of correction;* Lord Ellenborough, it is said, *interposed, and stated that this question should not be asked.* The Chief Justice, in support of this opinion, referred to the rule laid down by Ch. Justice Treby, before mentioned, that a witness is not bound to answer any question, the object of which is to degrade or render him infamous; and added, that he thought the rule ought to be adhered to. Now, it seems probable, from the reasoning of Lord Ellenborough, and from the former part of the report, stating, that the witness was a common informer and of a suspicious character, (which shows, that questions, reflecting upon his character, had been already asked without objection, and had been also answered,) it seems highly probable from these circumstances, that the witness, on being questioned as to the particular fact of his having been in a house of correction, either appealed to the Court for protection, or showed an unwillingness to answer; and if, after this, the question had been repeated, it might be thought necessary to interpose, and intimate, that the witness could not be compelled to answer, and that the question, therefore, ought not to be pressed; this shows the application of the rule, which Lord Ellenborough cited as having been laid down by Ch. Justice Treby, as to the privilege of the witness in not answering, which would have been cited prematurely, if the single point in discussion were, whether the question could in the first instance be legally asked. The observation here made, will, perhaps, have more weight, when

(*j*) See Note 522, a. p. 745.

Obligation to answer.

which questions of this description have been allowed by the Court. (1) The opinion of Ch. Justice Treby, and the other Judges, before cited, upon the point, whether the witness is compellable to answer, imply, that there is no objection, in point of law, to the asking the question; but that the objection arises in a later stage of the cross-examination, namely, when an attempt is made to compel him to answer. They are as strong authorities for the one position as for the other. The same observation may be made also with respect to the statute before referred to; which seems to imply, that there is no legal objection to a question, which may even subject the witness to forfeiture, although, if the question is asked, he may legally refuse to answer. (2) In addition to this, it may be observed, the common practice of courts of justice, before the most approved Judges, will abundantly furnish instances of such questions being asked, and not being disallowed as contrary to the rules of law: and it is difficult to see, how a question can

(1) In the case of R. v. Edwards, 4 T. R. 440, on an application to bail a prisoner, the Court allowed the counsel to ask one of the bail, whether he had stood in the pillory for perjury; the question was objected to, but the objection was overruled. In Watson's case, for high treason, questions of this description were frequently asked; and it may be inferred from the opinions of the judges, on an argument in that case, that such questions are regular. See Gurney's Report of Watson's Trial, 288—291. An instance occurred also in Lord Cochrane's trial, p. 419, by Gurney; and in Hardy's case, 24 Howell's St. Tr. 726. See also 11 East, 311. Harris v. Tippet, cited by Abbott J. 2 Stark. N. P. C. 155. 2 Campb. 638, S. C. The following case occurred at the sittings in K. B. after Hil. Term, 1818. In the case of Frost v. Holloway, Mr. Scarlet, in cross-examining a witness, asked him, whether he had not been tried for theft at Reading. The witness refused to answer, and appealed to Lord Ellenborough, whether he was bound to answer such a question. Lord Ellenborough said, "If you do not answer the question, I will commit you;" adding, "you shall not be compelled to say whether you were guilty or not." MS. note communicated by Mr. Gurney, who was counsel in the cause.

(2) 46 G. 3, c. 37, supra, p. 277.

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it is remembered, that Lord Ellenborough continually permitted such questions to be asked without the slightest disapprobation, a fact well known to all who are acquainted with the practice of that great master of the law of evidence. Macbride v. Macbride, was an action of assumpsit; a woman having given evidence of the plaintiff's demand, was asked on the cross-examination, whether she did not live in a state of concubinage with the plaintiff, when Lord Alvanley interposed, and is reported to have said, he thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness. On the trial of O'Coigley and O'Conner, a question was asked in cross-examination, which threw an imputation on the witness, and the counsel was not allowed to repeat the question or follow it up by another; but here the witness had first appealed to the Court for protection. (26 Howell's St. Tr. 1353.)

Privileged communications.

properly be deemed illegal, when, if the witness chooses to answer, his answer must undoubtedly be received as evidence(*k*).

Answer, if made, conclusive.

Assuming, that a question is not irregular, merely from its tendency to degrade the witness's character, and that the witness is not compellable to answer, yet, if he chooses to give an answer, the party, who asks the question, will be bound by his answer, and cannot be allowed to falsify it by his evidence. "You may ask the witness," said Lord Ellenborough in Watson's case,(1) whether he has been guilty of such a crime (improperly asking him in a degree, because you are calling upon him, upon the sanction of his oath, to answer that which he is not bound to answer, for no man is bound to criminate himself); but if from a desire to exculpate himself from the imputation of crime, he gives an answer, it has been held by many of our Judges, and I never knew it ruled to the contrary, that, having put such question, you must be bound by the answer. The court is not a court to try a collateral question of crime, and it would be unjust if it were; for how can the party be prepared with a case of exculpation, or with an answer to any evidence which may be produced to charge him? there is no possibility of a fair and competent trial upon that subject, and, therefore, in no instance is it done." (*l*)

Privileged communications.

There is another privilege, relating to certain kinds of information in the knowledge of a witness, which courts of justice will not permit him to disclose. This is not the privilege of the witness, but may be justly called a public privilege, and is observed by courts of justice on a principle of public policy, and from regard to public interests.

Agent of officer.

On the trial of Hardy for high treason, a witness, who had been employed by an officer of the executive government to collect information at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer, or the nature

(1) Gurney's Rep. 2 vol. 288. 32 Howell's St. Tr. 490, S C.

(*k*) See Note 522, b. p. 747. (*l*) See note 523, p. 748.

of the connection that had subsisted between himself and the officer. (1) Privileged communications.

Another witness, in the course of the same trial, had made reports, from time to time, of the proceedings of some corresponding societies, and had made these reports by the advice of a third person, and under the impression, that the information, contained in the reports, would be transmitted to another quarter for the purpose of disclosure; this witness was asked, whether he had communicated his reports to a magistrate of any description; (2) Lord Ch. Justice Eyre considered this a proper question; the witness, on answering in the negative, was then asked, to whom he had made the communication. This question was objected to; Lord Ch. Justice Eyre, upon this, said, "It is perfectly right, that all opportunities should be given, to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel, by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear, that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in this particular case." Agent of police.

The cross-examination of the same witness then proceeded, and the witness admitted, that he had communicated what he knew to a friend, who advised him to communicate his reports of the proceedings to another person. He was then asked, whether that friend was a magistrate; this he answered in the negative: then came the question, who was the friend? This was objected to; (3) and the objection was, that the person, by whose advice the information was given to a person standing in the situation of magistrate, was, to all intents and purposes, the informer, and that his

(1) 24 Howell's St. Tr. 753, on cross-examination of Groves. The same principle was acted upon in the prosecution of Horne Tooke for high treason; in the prosecution of Walker and others for a conspiracy; and in the late prosecution of Watson for high treason. Gurney's Report, p. 169. See also 32 Howell's St. Tr. 100.

(2) 24 Howell's St. Tr. 808; on the cross-examination of Lyman.

(3) 24 Howell's St. Tr. p. 811.

Privileged communications.

name, therefore, could not be disclosed. (1) The Judges differed in opinion upon this point; the Lord Chief Baron Macdonald and Mr. Justice Buller were of opinion, that the question was proper: but the majority of the Court, consisting of the Lord Chief Justice Eyre, Mr. Barron Hotham, and Mr. Justice Grose, were of the opposite opinion. Lord Chief Justice Eyre said, "Those questions which tend to the discovery of the channels, by whom the disclosure was made to the officers of justice, are not permitted to be asked.

Such matters cannot be disclosed, upon the general principle of the convenience of public justice. All persons in that situation are protected from discovery. It is no more competent to ask who the person was that advised the witness to make the disclosure, than it is to ask to whom he made the disclosure in consequence of that advice, or than it is to ask any other question respecting the channel of information, or what was done under it." Mr. Justice Grose considered the adviser of the witness to be substantially in the situation of an informer, and that his name, therefore, ought not to be revealed. Mr. Baron Hotham also considered the person to be an informer; the witness, he said, had made the communication to his friend, under an impression and full persuasion, that through him the intelligence might be conveyed to a magistrate; and there was no distinction, he added, between making a disclosure to the magistrate himself, or making it to another person, who was to communicate it to the magistrate. The Judges who were of opinion that the question might properly be asked, admitted the general rule, and differed only in the application of that rule to the particular facts of the case. The Lord Chief Baron said, if he were satisfied that the friend to whom the witness disclosed this matter was in any way a link in the communication, he should certainly agree that the rule applied to him; but this person not being connected either with the magistracy, or the executive government, the case did not appear to him to fall within the rule. Mr. Justice Buller admitted the rule with respect to the informer to the utmost extent: "if the name of the informer," he said, "were to be disclosed, no man would make a discovery, and public justice would be defeated." (*m*) He admitted, also, that if a middle man is made the channel of communication, he ought to

(1) 24 Howell's St. Tr. p. 814.

(*m*) See Note 524, p. 748.

Privileged communications.

receive the same protection as the first person to whom it is mentioned. But he differed in opinion only as to the situation of the friend, respecting which this question arose: in his view of the evidence, he considered, that the witness had communicated the information to another man, not for the purpose of prevailing upon him to make the disclosure to a magistrate, but merely to consult him for the purpose of making up his own mind whether he should himself make the discovery; he was, therefore, of opinion that the witness ought not to be allowed to answer the question.

Result of cases.

Hence it appears, that a witness who has been employed to collect secret information for the use of government, or for the purposes of the police, will not be permitted to disclose the name of his employer, or the nature of the connection between that employer and himself, or the name of any person from whom he may have received the information, (1) or the name of the person to whom he may have conveyed the information for the purpose of being transmitted; or any other matter, which exposes the channel of information. And as it would not be proper to enquire, to what officer of government the information had been given, so neither can it be asked, whether the communication has been made by that officer to the government. (2)

Official communications.

Upon the same principle of public policy, official communications between the governor and law-officer of a colony, respecting the state of the colony, (3)—orders given by a governor of a colony to a military officer, (4)—a correspondence between an agent of government and a secretary of state, (5)—the report of a military court of enquiry, respecting an officer whose conduct the Court had been appointed to examine, (6)—the official correspond-

(1) And see 2 Brod. & Bing. 162.

(2) R. v. Stone, cited by Lord Ellenborough in R. v. Watson, 2 Starkie. N. P. C. 136 32 Howell's St. Tr. 101, S. C. Another example may be seen in De Berenger's case, p. 344, of Gurney's report.

(3) Wyatt v. Gore, Holt, N. P. C. 299.

(4) 2 Starkie, N. P. P. 183.

(5) Anderson v. Sir W. Hamilton' 2 Brod. & Bing. 156. Note.

(6) Home v. Lord T. Bentinck, 2 Brod. & Bing. 130. See Lee, q. t. v. Birrell, 4 Campb. 335.

Privileged communications.

ence between the commissioners and an officer of the customs, (1) —are confidential and privileged communications, which courts of justice will not allow to be disclosed. (*n*)

Privy counsellor.

On the trial of the Earl of Stafford for high treason, in the reign of Charles the First, that nobleman's confidential advice to the king, at the council-table, was revealed by a privy counsellor, and much pressed against the prisoner. This disclosure was in violation of the oath taken by members of the privy council. (2) Lord Clarendon, in his history, justly reprobates the proceeding, as "tending to banish forever all future freedom from the council-board, and from those persons from whom his Majesty was to expect advice in his greatest straits; all men satisfying themselves, that they were no longer obliged to deliver their opinions there freely, when they might be impeached in another place for so doing." (3)

Member of parliament.

In the case of Plunket v. Cobbett, (4) (which was an action against the defendant for publishing a libel reflecting on the conduct of the plaintiff, as a member of the Commons' House of Parliament in Ireland,) the counsel for the defendant enquired of one of the witnesses, in cross-examination, as to the expressions and arguments which the plaintiff had used in Parliament on a particular subject, when Lord Ellenborough interposed, and stopped the examination, observing, that it would be a breach of duty in the witness, as a member of the Irish Parliament, and a breach of his oath, to reveal the councils of the nation.

Grand juryman.

Witness before grand jury.

It does not appear to be completely settled, that a grand-juryman is at liberty to disclose the evidence laid before the grand-jury, in the course of a criminal proceeding. In an action on the case, for maliciously indicting the plaintiff, Lord Kenyon is reported to have allowed the counsel for the plaintiff to enquire of a grand-juryman, whether the defendant was prosecutor of

(1) Black v. Holmes, Fox & Smith's Rep. 28, K. B. in Ireland.
(2) 4 Inst. 54.
(3) See Lord Clarendon's History.
(4) 29 Howell's St. Tr. 71, 72.

(*n*) See Note 525, a. p. 749.

the indictment; being of opinion, that this inquiry did not infringe upon the official oath taken by the witness. (1) (*o*) Privileged communications.

On the trial of Watson for high treason, a witness was questioned by the counsel for the prisoner as to his having produced and read a certain writing before the grand jury: this being objected to by the Solicitor-general, Lord Ellenborough C. J. said, "he had considerable doubt upon the subject: he remembered a case in which a witness was questioned as to what passed before the grand jury, and, though it was a matter of considerable importance, he was permitted to answer." The Solicitor-general then intimating, that if such a case had not occurred, he should have thought that what passed before the grand jury could not properly be enquired into, as they are sworn to secresy. Lord Ellenborough added, that "he had doubts, and that many very eminent men at the bar had entertained doubts upon the point; but that he remembered the case perfectly." (2) Here the matter seems to have dropped; and the question, as originally put, was not repeated.

A witness can depose only to such facts as are within his own recollection. (*p*) But, to assist his memory, he may use a written entry in a book, or a memorandum, or the copy of a memorandum: (*q*) such entry or memorandum having been made at the time when the fact occurred, or recently afterwards: and if, after looking at the memorandum, he can positively swear to the truth of the fact there stated, such evidence will be sufficient. But if he cannot, from recollection, speak to the fact any further, than as finding it stated in a written entry, his testimony will amount to nothing. (3) The entry, to which the witness has recourse for assisting his recollection ought to have been made by the witness himself, or, if made by another, examined by him, while the fact was fresh in his memory. (4) It is always usual, and very reasonable, when a wit- Memorandum.

(1) Sykes v. Dunbar, 2 Selw. N. P. MSS. The only part of the oath which can be supposed to be a bar to disclosure is the following: "the king's counsel, your fellow's, and your own, you shall keep secret."

(2) 32 Howell's St. Tr. 107.

(3) Sandwell v. Sandwell, by Holt C. J., Comberb. 445. Doe v. Perkins, 3 T. R. 752. Tanner v. Taylor, ib. 754. 8 East, 284, 289. Hedge's case, 28 Howell's St. Tr. 1367.

(4) Burrough v. Martin, 2 Campb. 112.

(*o*) See Note 525, p. 749. (*p*) See Note 526, p. 749. (*q*) See Note 527, p. 750.

Opinion of witness.

ness speaks from memoranda, that the counsel should have an opportunity of looking at them, when he is cross-examining the witness. (1) (*r*)

Opinion of witness.

The opinion of a witness, in general, is not evidence: the witness must speak to facts. But on questions of science or trade, or others of the same kind, persons of skill may speak not only as to facts, but are allowed also to give their opinions in evidence. The opinion of medical men is evidence as to the state of a patient, whom they have seen. Even, in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his state, detailed by other witnesses at the trial, their opinion on the nature of such symptoms has been properly admitted. Thus, on a question of sanity, medical men have been permitted to form their judgment upon the representation, which witnesses at the trial have given of the conduct, manner, and general appearance exhibited by the patient. (2) So, in prosecutions for murder, they have been allowed to state their opinion, whether the wounds, described by witnesses, were likely to be the cause of death.

Of medical men.

Of underwriters.

The opinion of a person conversant with the business of insurance, on the question, whether a premium would have been increased by the communication of particular facts, has been thought admissible, as judgment in a matter of trade. (3) Ship-builders have been admitted to state their opinion on the seaworthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present. (4) In an action of trespass, alleged to have been committed in making an embankment, which was said to have gradually choked up a harbor, an engineer was permitted to prove, from his own experiments, what were the effects of natural causes upon that particular harbor, and on other harbors similarly situated on

Ship-builders.

Engineers.

(1) By Lord Ch. Just. Eyre, in Hardy's case, 24 Howell's St. Tr. 824.

(2) Wright's case, Russ. & Ry. Cr. C. 456. Although they may be admitted, after hearing such evidence, to give their opinion, whether certain symptoms are symptoms of insanity; it seems, they are not competent to give an opinion, whether an act, for which a prisoner is tried, was an act of insanity. Ib.

(3) Barthon v. Loughman, 2 Starkie, N. P. C. 258. But see Durrel v. Bederley, Holt, N. P. C. 286, stated in vol. ii.

(4) Thornton v. Royal Exch. Ass. Company, Peake, N. P. C. 25. Chaurand v. Angerstein, do. 43. Beckwith v. Sydebotham, 1 Campb. 117.

(*r*) See Note 528, p. 750.

the same coast, and that the removal of the bank would not, in his opinion, restore the harbor.(1) Where the question is, whether a seal has been forged, seal-engravers may be called to show a difference between a genuine impression and that supposed to be false.(2) And the opinion of an artist in painting is evidence as to the genuineness of a picture.(3)(*s*)

General character of witness.

Artist.

There are several ways of impeaching the credit of a witness.

Credit of witnesses impeached.

First, The party, against whom a witness is called, may disprove the facts stated by him, or may examine other witnesses as to his general character. To impeach the credit of a witness, says Mr. Justice Buller,(4) you can only examine to his general character, and not to particular facts; and the reason given is, that every man may be supposed capable of supporting his general character, but it is not likely he should be prepared to answer to particular facts, without notice; and unless his general character and behaviour are in issue, he has no notice. If a witness, for example, on being questioned, whether he has not been guilty of a felony or of some infamous offence, deny the charge, the party, against whom the witness has been called, will not be allowed to prove the truth of the charge:(5) such evidence is not admissible, either for the purpose of contradicting, or of discrediting him.

1. Proof of general character.

Collateral facts.

This principle has been established by many cases of great authority. In the case of Rookwood, who was tried for high

(1) Folkes v. Chad, 1783, MS. S. C. cited by Buller J. in Goodtitle v. Braham, 4 T. R. 498.

(2) By Ld Mansfield, in Folkes v. Chad, ib.

(3) On the admissibility of opinion, as to the genuineness of hand-writing, vide part 2, of this vol ch. 8, sect. 2.

(4) Bull. N. P. 296. See also Rookwood's case, 4 St. Tr. 693, S. C. 13 Howell's St. Tr. 210. Layer's case, 6 St. Tr. 298, 316, S. C. 16 Howell's St. Tr. 246, 284. De La Motte's case, 21 Howell's St. Tr. 811. In some instances, in the State Trials, evidence of particular facts appears to have been admitted; as in Lord Castlemain's case, 7 Howell's St Tr. 1102, 1110. Cranburne's case, 13 Howell's St. Tr. 261, and Harrison's case, 12 Howell's St. Tr. 862; but no objection was made to the evidence, in those cases.

(5) Rookwood's case, and Layer's case, cited (4) supra. R. v. Watson, 3 Starkie. N. P. C. 149. 32 Howell's St. Tr. 490, S. C. Sharpe v. Scoging, Holt, N. P. C. 541. The same rule is observed in the Courts of Justice in Scotland; see Burnet's Treatise of Crim. Law of Scotland, p. 397.

(*s*) See Note 529, p. 759.

General character of witness.

treason,(1) the point was considered as too clear for argument: "Look ye," said Lord Chief Justice Holt, "you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think, that we will try, at this time, whether he be guilty of robbery." And on the trial of Layer for high treason,(2) Lord North and Grey being called, on behalf of the prisoner, to give a report of the character, which one of the witnesses for the prosecution had given of himself much to his disadvantage, the Lord Chief Justice Pratt said to the prisoner's counsel, "You know what the rule of practice and evidence is, when objections are made to the credit and reputation of the witness; you cannot charge him with particular offences: for if that were to be allowed, it would be impossible for a man to defend himself. You are not to examine to particular facts, to charge the reputation of any witness; but you are to ask, in general, what is his character and reputation." And in summing up the case to the jury, the Chief Justice said, "The reason, why particular facts are not to be given in evidence, to impeach the character of the witness, is, that if it were permitted, it would be impossible for that witness, having no notice of what will be sworn against him, to come prepared to give an answer to it; and thus the characters of witnesses might be vilified, without having any opportunity of being vindicated." The point was much discussed in the late trial of Watson for high treason; and the principle, above laid down, which had been settled so long before, was again recognised and fully confirmed.(3)(*t*)

Mode of examining.

The regular mode of examining into general character is to enquire of the witnesses, whether they have the means of knowing the former witness's general character, and whether, from such knowledge, they would believe him on his oath. (4)

Answer.

In answer to such evidence against character, the other party may cross-examine those witnesses, as to their means of knowledge, and the grounds of their opinion; or may attack their general

(1) 4 St. Tr. 693, S. C. 13 Howell's St. Tr. 211.
(2) 6 St. Tr. 298, 316, S. C. 16 Howell's St. Tr. 246, 286.
(3) Vol. ii. p. 288, Gurney's Rep. 32 Howell's St. Tr. 490, 492, S. C.
(4) Rookwood's case, 4 St. Tr. 693, S. C. 13 Howell's St. Tr. 210. Mawson v. Hartsink, 4 Esp. N. P. C. 102.

(*t*) See Note 530, p. 763.

character, and by fresh evidence support the character of his own witness. (*u*)

Contradictory statements.

Secondly, The credit of a witness may be impeached, by proof, that he has made statements out of court, on the same subject, contrary to what he swears at the trial. (1) A letter written by him, or a deposition signed by him, may be used as evidence to contradict his testimony; the letter, or deposition, being first regularly proved. An examined copy of an answer in Chancery is sufficient proof of the answer, for the purpose of contradicting a witness. (2) A conviction before a magistrate, purporting to set out the deposition of a witness, is not admissible, as proof of such deposition. (3)

2. Proof of contradictory statements.

The verbal declarations or statements of a witness, made on some former occasion to a third person, are frequently given in evidence, by the party against whom the witness appears, with the view of showing that his several accounts of the particular transaction, on which he has been examined, are inconsistent and contradictory. This evidence of contradictory statements is produced, for the purpose of exciting doubt and distrust against his testimony, as to the particular transaction, on which the discrepancy arises, or, perhaps, to raise suspicion as to the truth of his testimony, in general.* Before such evidence can be regularly admitted on behalf of the party, it will be necessary, in the first instance, to prepare the way for its admission, by cross examining the witness as to the supposed contradictory statements, which are afterward to be brought forward against him.

Cross-examination as to *verbal* statements of the witness.

(1) De Sailly v. Morgan, 2 Esp. N. P. C. 691. Christian v. Coombe, 2 Esp. N. P. C. 489.

(2) Ewer v. Ambrose and another, 4 B. & Cr. 25.

(3) R. v. Howe, 6 Esp. N. P. C. 125. 1 Campb. 461, S. C.

* According to the practice of the courts in Scotland, the credit of a witness cannot be impeached by proof of his having given a different account of the matter on a former occasion. The witness may, if he chooses, call for his declaration, (or deposition, if he has been sworn,) and have it cancelled in his presence, before his examination begins, that he may be free, and unfettered, in giving his evidence on the trial. And, if the declaration should not have been cancelled, it cannot be used in any manner to the prejudice of the witness. See Hume's Com. on the Crim. Law of Scotland, vol. ii. p. 367; and Burnett's Trea. on the same subject, p. 467.

(*u*) See Note 531, p. 767.

Contradictory statements.

This course of proceeding is indispensable, from a principle of justice due to the witness; for as the direct tendency of the evidence is to impeach his veracity, by contrasting his present state with that supposed to have been made by him to some other person, common justice requires, that, before his credit is attacked, he should have an opportunity of declaring, whether he ever made such statement to that person, and of explaining, in the re-examination, the nature and particulars of the conversation, under what circumstances it was made, from what motives, and with what design. The former account, given by him in conversation, may have been only partially heard, or misunderstood, or partly forgotten, or intentionally misrepresented; and where the variance between his present statement upon oath, and the former statement, as reported by a third person, may be as much owing to the mistake of the one witness as to the misrepresentation of the other, it will be necessary, that the memory and credit of both witnesses should be fairly tried and contrasted; and, with this view, the person, with whom the conversation is supposed to have passed, and the particulars of the conversation, on which it is intended to contradict the witness, shou'd be distinctly suggested to the witness, before any contradiction is attempted. (1) If, for instance, a witness, on being examined in chief as to some transaction, supposed to have occurred between certain persons, should admit, that he had heard of such a thing, but does not know its cause, it would be irregular to prove his having made a declaration respecting the cause, in order to prove his knowledge of the cause, without first asking him, in the cross-examination, whether he had not made such a declaration; or, if he had answered, that he did not remember the transaction, it would be equally irregular, without such previous cross-examination, to prove declarations made by him respecting the transaction, for the purpose of showing, that he must have remembered it. (2)

Thus it appears, that a witness ought regularly to be cross-

(1) See the opinion of the Judges, in the course of the proceedings in the House of Lords, on the bill of pains and penalties; p. 575, of the printed evidence. Some of the preceding remarks have been suggested by that opinion. The opinion of the Judges, on the several points which arose during these proceedings are reported also in 2 Brod. & Bing. p. 286, 315.

(2) Ib. p. 576.

examined as to contradictory statements, supposed to have been made by him on a former occasion, before such contradictory statements can be admitted in evidence, to impeach the credit of his testimony. And this rule has been extended not only to such contradictory statements, but also to other declarations of the witness, and to acts done by him through the medium of declarations or words. So that, if it is intended to offer evidence of former declarations of the witness, or of acts done by him, though not with a view to contradict his statement upon oath in the examination in chief, but with the view of discrediting him as a corrupt witness, or as one who would corrupt other witnesses; in this case also, it has been determined, that the witness should be previously questioned as to such declarations, or such acts, on the cross-examination. This appears from an answer of the Judges to a question put to them by the House of Lords, in the course of the proceedings before referred to. (1) The question was in the following words: "Whether, if a witness in support of a prosecution has been examined in chief, and has not been asked, in cross-examination, as to any declarations made by him, or as to acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it would be competent to the party accused to examine witnesses in his defence, to prove such declarations or acts, without first calling back such witnesses, to be examined, or cross-examined, as to the fact, whether he ever made such declarations, or did such acts?" Another question was the following: "If a witness, called on the part of a plaintiff or prosecutor, gives evidence against the defendant, and if, after the cross-examination of such witness by the defendant's counsel, they discover, that the witness, so examined, has corrupted, or endeavored to corrupt, another person to give false testimony in such cause; whether the defendant's counsel may not be permitted to give evidence of such corrupt act of the witness, without calling him back?" The Judges were of opinion, on both questions, that the proposed proof could not be adduced without a previous cross-examination of the witness as to the subject-matter. "The general rule," said the Lord Chief Justice, "and the general practice, is this: if it be intended to bring the credit of a witness into question, by proof of any thing that he

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(1) Page 205 of the printed minutes of evidence.

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may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved."

Cross-examination as to *written* statements of the witness.

The rules of cross-examination as to contradictory written statements, supposed to have been made by the witness, were much discussed in the same proceedings, in the House of Lords. On one occasion, in the course of those proceedings, (1) a letter was shown to a witness on cross-examination, and, on being questioned as to the hand-writing, she affirmed, that she could not say whether it had been written by her. The counsel then proceeded to cross-examine the witness, as to her having written certain particulars in a correspondence with her sister. This mode of cross-examination was objected to; on which occasion, the following question was put by the House of Lords to the Judges for their opinion: (2) "Whether a party would be allowed, in cross-examining a witness, to represent, in the statement of a question, the contents of a letter; and then to ask the witness, whether he wrote such a letter to any person with such contents, or contents to the like effect, without having first shown the letter to the witness and asked him whether he wrote it, and without his admitting that he wrote the letter?" The Judges were of opinion, that the question must be answered in the negative; and the reason of their opinion was, "That the contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. (*v*) The proper course, therefore, is, to ask the witness, whether that letter is of his hand-writing; if the witness admits it to be his hand-writing, the cross-examining counsel may, at his proper season, read that letter as evidence: and when the letter is produced, then the whole of the letter is made evidence. One of the reasons (continued the Lord Chief Justice) for the rule requiring the production of written instruments, is, in order that the Court may be possessed of the whole. If the course, here proposed, should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper;

Cross-examining as to contents of a letter.

(1) In the case of the witness Louisa Demont, page 328, 334, of the printed evidence.

(2) Printed evidence, page 334. 2 Brod. & Bing. 286, S. P. See 3 Barn. & Cress. S. P. 749, l. 15.

(*v*) See Note 532, p. 771.

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and thus the Court may never be in possession of the whole, though it may happen, that the whole, if produced, may have an effect very different from that which might be produced by the statement of a part." The writing, therefore, if in existence and producible, ought to be produced and shown to the witness. When it is produced, the cross-examining counsel may, if he thinks proper, show the witness only a part, or only one or more lines of the letter, and not the whole of it; and may ask the witness, whether he wrote such part, or such one or more lines. (1) If the witness does not admit, that he wrote the part shown to him, he cannot be cross-examined as to the contents of the letter, for the reason already given; namely, that the paper itself ought to be produced, in order that the whole may be seen, and the one part explained by the other. (2) If, on the other hand, the witness should admit, that he wrote the letter, still the rule with respect to cross-examining, as to the contents, is precisely the same: the counsel cannot enquire of the witness whether or not such statements are in the letter; the letter itself must be read, to show whether it contain such statements. (3) With respect to the proper time for reading the letter, the ordinary rule is, that it shall be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; this is the ordinary course; but if he suggests to the Court, that he wishes to have the letter read immediately, in order to found certain questions upon the contents, which cannot well or effectually be done, without reading the letter itself; in that case, for the more convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel; still, however, it must be considered as part of the evidence of the cross-examining counsel, and subject to all the consequences of his having it so considered. (4)

The rule, above laid down, for cross-examining a witness as to the contents of a letter or other written paper, is applicable, at the furthest, only to a case in which the writing is supposed to

(1) The opinion of the Judges on the second question in the case of the same witness, page 335 of the printed evidence. 2 Brod. & Bing. 286.

(2) Answer of the Judges to the second part of the second question, page 335 of the printed evidence.

(3) Opinion of the Judges, in answer to another question, in the case of the same witness, p. 337 of the printed evidence. 2 Brod. & Bing. 788.

(4) Opinion of the Judges, in answer to the 2d part of the last-mentioned question. 2 Brod. & Bing. 289.

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be in existence. This appears to be clear, from considering the opinion of the Judges, and the circumstances out of which the question arose. The letter, written by the witness, was, in that case, actually in the possession of the cross-examining counsel, produced by him, and shown to the witness; the question, referred to the Judges, proceeds upon the supposition of the letter being producible; and the entire reasoning, on which their opinion is founded, expressly refers to the case of an existing paper. They held, in the case proposed, that the counsel could not cross-examine as to the contents of a letter, which was produced and shown to the witness; because "the contents of every written paper are to be proved by the paper itself, and by that alone, if the paper be in existence." But if the paper be not in existence, this reasoning will not apply. If, therefore, a letter, written by the witness, is proved to have been lost or destroyed, (in which case, the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the letter,) then it would be reasonable and proper to allow the counsel to cross-examine the witness as to the contents of such letter. This, indeed, appears to be the only regular mode of proceeding; for, as the credit of the witness may be afterwards impeached by proof of the contents of the lost letter, no less than by the production of an original letter, justice requires, that the witness should first have an opportunity, in his own defence, of entering into a full statement of what he has written; and this statement is not inferior, in its kind, as evidence, to any other secondary proof of the contents, that may be afterwards produced to contradict him. This latter circumstance distinguishes the case from that before mentioned, in which the witness's letter was in the possession of the cross-examining counsel, and that letter, if produced, would have been the best, and, as the Judges held, the only legitimate proof of its contents. It may, perhaps, be suggested, that, since the proof of the loss or destruction of the writing is strictly necessary, before the counsel, in such case can cross-examine as to its contents, the introduction of such antecedent proof might occasion great inconvenience, by disturbing the regular progress of the cause, and distracting the attention. But when this inconvenience is likely to be felt in any great degree, it will be always in the power of the Judge, if he shall

Cross-examining as to lost letter.

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think proper, either to admit, in the first instance, the witness's statement of the contents of the writing, or to reserve the power of cross-examining as to its contents, until the time has arrived, when the counsel on the opposite side shall enter upon his case.

Cross-examining as to having written a different statement.

A question, connected with this subject, here naturally occurs; whether counsel may be allowed to cross-examine a witness, as to his having written a letter containing a different statement. This question, it is conceived, in the general form here stated, has not been determined by the resolution of the judges in the case before mentioned: for, in that case, the question, put to a witness, related to a variety of particular expressions and entire passages, supposed to be contained in a letter, and the letter, which was supposed to contain such expressions, had been actually produced, and shown by the counsel: whereas, on the contrary, the question, here proposed, is quite general, namely, whether the witness has given any account in his letters, or otherwise, differing from his present statement; and the question is proposed, without any reference to the circumstance, whether the letter is or is not in existence, or whether it has or has not ever been seen by the cross-examining counsel. Nor does the question, here proposed, appear to have been determined by the resolution of the Judges, on a question, which occurred in a later stage of the proceedings; since, in this latter case also, the question related to particular expressions, supposed to have been contained in the letter, and the opinion of the Judges seems to have been partly founded on the supposition, that the witness's letter was actually in the possession of the cross-examining counsel, as afterwards distinctly appeared to be the fact.* Since the subject, therefore, seems still open for discussion, and may be considered of some importance, as affecting very materially the powers of cross-examination, upon which the right admin-

* The question, here alluded to, arose in the following manner.(*a*) The cross-examining counsel asked a witness, named Giuseppe Sacchi, "Whether he had ever represented to any person, after he had left the service of the Princess, that he taxed himself with ingratitude towards a generous mistress?" On this, the Attorney General submitted, that the question should be put, whether he had so represented himself *in conversation*; for, that if the representation was in writing, the writing itself should be produced, before the question could be put. After an

(*a*) Printed evidence, p. 445.

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istration of justice so much depends, it will not, perhaps, be thought foreign to the subject, to consider, whether any legal objection can be made to the proposed question. The question is this; Can a witness be properly asked, in the cross-examination, whether he has written any letter giving a different account?

Objection.

The objector to such a question might possibly urge, that if the account is in writing, the writing ought to be produced, as the best evidence, and that the witness's statement of the contents of the letter is only secondary evidence, which cannot be received:

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argument upon the point, the following question was put to the Judges: "Whether, according to the established practice in the courts below, counsel in cross-examining are entitled, if the counsel on the other side object to it, to ask a witness, whether he has made representations of a particular nature, not specifying in his question, whether the question refers to representations in writing or in words?"

The Lord Chief Justice, in delivering the opinion of the Judges,(*a*) observed, that they felt some difficulty in giving a distinct answer to that proposition, as they did not remember an instance of a question having been asked by the cross-examining counsel precisely in those words, and they were not aware of any established practice distinctly referring to such a question The Lord Chief Justice then adverted to the rule of law respecting the examination of a witness, as to a contract or agreement, in which case, if the counsel on the one side were to put a question generally as to the contract, the ordinary course is for the counsel on the other side to interpose an intermediate question, whether the contract referred to was in writing, and if the contract should appear to have been in writing, then all further enquiry would be stopped, because the writing itself must be produced. With reference to this established rule, they considered the question proposed to them, and were of opinion, that the witness could not properly be asked, on cross-examination, whether he had *written such a thing, the proper course being to put the writing into his hands, and ask him whether it be his writing;* they held also, that if the witness were asked, whether he had *represented such a thing*, they should direct the counsel to ask, whether the representation had been made *in writing*, or by words; and if, in consequence, he should ask, whether it had been made *in writing*, the counsel on the other side would object to the question; but if he should ask, whether the witness had *said* such a thing, the counsel would undoubtedly have a right to put that question.

The counsel were then called in,(*b*) and were informed that if, on cross-examination, they enquired of a witness, whether he had made representations of any particular nature, stating the nature of those representations, they should, in their enquiry, ask the witness first, "Whether he made the representations by parol, or in writing?"

The Attorney-General of the Queen enquired, whether he might be at liberty to alter his question, and put it thus: "Did you ever make any representation in writing concerning your real or supposed ingratitude towards so generous a mistress as Her Royal Highness?" The counsel were then directed to withdraw, and, on their being recalled, the counsel for the Queen were asked, whether they wished to withdraw the question; upon which the Attorney-General of the Queen stated, that he begged to withdraw the question, to save the necessity for further discussion. The examination then proceeded, and letters were put into the witness's hands, which he admitted to be his hand-writing.

(*a*) Page 446, 2 Brod. & Bing. 293 (*b*) Page 447.

that, upon this principle, a witness cannot be examined as to the contents of a deed, or written contract, or other written instrument unless the original is lost, or destroyed, or in the possession of the adverse party. Or, lastly, it might be argued, that the witness may not be able to remember some particulars of his letter, especially of a letter written sometime before, and may, perhaps, suppose the statement, contained in it, to vary in some respects from the account which he has given in his examination in chief, and to be different, also, from what the latter realy was; in which case, the witness may make an inaccurate representation of its contents, to his own disadvantage, and his character may consequently suffer, without any just ground of imputation; whereas, if the letter itself were produced, this difference of statement might be corrected and satisfactorily explained. Contradictory statements.

The argument on the other side, in support of the question, may be supposed to be of the following kind. First, with respect to the principle, urged in support of the objection, (namely, that the letter itself is the best evidence, therefore that the parol evidence of the witness is not admissible,) although this principle holds almost universally *with reference to the proof of the issue, and every material part of the issue*, it will be found not to apply to a cross examination, which is solely intended to *try the witness's credit and veracity*. A witness, it is admitted, cannot be questioned as to the contents of a written agreement, or other written instrument, wherever the agreement, or writing, is either part of the issue, or material to the issue; because the writing itself is the best proof of its contents; and this being within the knowledge of the parties, (as it must be supposed to be, from its being material to the issue,) the party, who wishes to avail himself of the writing, ought to be provided with the regular proof of its contents; and the circumstance of his not satisfactorily accounting for the non-production of the original instrument, is of itself matter of suspicion. Chief Baron Gilbert, in treating of the general rule, evidently considers it as a rule applicable only *to the proof of the issue, or of some fact material to the issue*. "The true meaning of the rule of law, (he says,) (1) which requires the greatest evidence, that the nature of the thing is capable of, is this; *that no such evidence shall be brought, which* ex natura rei, Answer. 1. Meaning of the rule as to production of the best evidence.

supposes still greater evidence behind the party's own possession and power; for such evidence is altogether insufficient, and proves nothing; for it carries a presumption with it, contrary to the intent, for which it was produced; for, if the other greater evidence did not make against the party, why did he not produce it to the court? As, if a man offers a copy of a deed or will, *where he ought to produce the original*, this carries a presumption with it, that there is something more in the deed or will, that makes against the party, or else he would have produced it; and therefore the proof of a copy, in this case, is not evidence, and cannot possibly weigh any thing in a court of justice." This reasoning cannot justly be applied to the subject now under discussion; which is merely this, whether the cross-examining counsel may ask a witness, whether he has written any letter, giving an account different from that which he has given in his examination in chief. For the question here proposed, or the witness's answer, (whether his answer be in the affirmative or in the negative,) cannot justly raise any presumption, that the original letter is, at the time of the trial, or ever has been, in the possession or power of the party, against whom the witness appears; and the non-production of the witness's letter cannot justly be imputed to the party as matter of suspicion, when it does not appear, whether any such letter was ever written, or to whom written, or at what time, or under what circumstances. If the witness denies, that he ever wrote a different statement, then the cross-examining counsel cannot impeach his evidence by calling another witness to speak to the contents of the letter, because, in this case, the witness and the party are at issue as to the contents, and the original letter must be produced, or its loss satisfactorily proved, otherwise, it must be presumed, in justice to the witness, that the letter, if produced, would not contradict his testimony. But if, on the other hand, the witness confesses, that he has written a contradictory statement, and cannot satisfactorily explain the contradiction, surely such an admission (being, in some degree, against his own character, and, therefore, against his own interest,) will be quite as satisfactory and convincing, upon this point, as the letter itself could be; and it cannot reasonably be presumed, that the letter, if produced, would corroborate the statement, which

(1) Gilb. Ev. 13.

the witness made in his examination in chief, when he himself negatives such a supposition by his own confession. The general rule, therefore, that the best evidence is to be produced, which the nature of the thing admits, is to be understood as applying to deeds and agreements, which *form part of the issue*, or which are *material to the issue*—to written notices to quit, in an action of ejectment, on the expiration of a yearly tenancy—to letters written by either *party to the suit*,—and to other instances of a similar kind: in which cases, the non-production of the writing may afford well-grounded suspicion against the party, who would inquire into its contents; but it is submitted, for the reasons before mentioned, that the rule cannot apply to the question now under consideration; and it certainly has not been so applied either by Chief Baron Gilbert or Mr. Justice Buller, who have fully entered into the reason and principle of the general rule. Contradictory statements.

Again, if the rule is, as argued on the other side, that a witness cannot be questioned, as to some different statement supposed to have been written by him, how is it that a witness may be questioned, on the *voire dire*, as to his taking, under some written agreement, an interest in the event of the suit; for, as in the former case, the letter would be the best proof of its contents, so, in this case, the written agreement would be the best proof of any interest which the witness may take under it; yet, it is certain, that such an examination, as to the contents of written instruments, is strictly regular, with a view to discover the *interest* of the witness; and the reason for this seems to be, because the opposite party may possibly be ignorant of the existence of any such instrument, and may not know, that a particular witness would be called on the other side. (1) For the same reason, precisely, the proposed question, as to the *credit* of the witness, seems to be regular; because the witness may be a stranger, or, if known, may be unexpected; and the party against whom he appears, may be ignorant of the letter, or without the means of procuring

(1) If the witness produces the instrument, under which he is supposed to take the interest, the instrument itself ought to be read, as supplying the best proof of the witness's situation. Butler v. Carver, 2 Starkie, N. P. C. 434. So, if the witness were to produce the letter, on which he is cross-examined, the letter itself should be read, as best proving whether its contents are contradictory, or confirmatory of his evidence.

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it, or may have no reason to suppose, that any such letter could be wanted.

If the argument on the other side can be maintained, it would not be allowable, in cross-examination, to ask an accomplice, or other witness, who appears against a person on a criminal prosecution, whether he has not been himself tried for some offence; for it might be objected, with as much reason, that the fact of his having been tried for such an offence is partly matter of record, and therefore not to be proved without the record, which is the highest species of proof; yet such questions are continually asked, and it has not been the practice to disallow them, merely on the ground, that the witness's answer is not the best evidence of the fact, that can be produced. For these reasons, it may be said, the general rule, respecting the production of the best evidence, appears not to be applicable to the question here considered.

2. Supposed hardship.

Lastly, with respect to the supposed hardship and unfairness of subjecting a witness to such cross-examination, when he may have forgotten the particulars of his letter, and erroneously may suppose, that it represented the transaction in a manner different from what he has represented it in his evidence, it may be observed, that such a case, if not impossible, is at least not probable; for it is difficult to conceive, that a witness of the weakest understanding could be persuaded to believe, that he has made different statements, when, in fact, his statements have always been the same. But, if such an improbable case should occur, it would not occasion any embarrassment to a witness of character, who has no design to disguise or misrepresent. Whatever observations can fairly be made, on behalf of a witness in such a situation, will be suggested by the Court; and the jury will have the means of judging, whether the difference of statement arise from mere mistake, or from an intention to deceive.

Re-examination as to former statements.

As the object of cross-examining a witness, respecting a former statement, supposed to have been made by him, is to impeach the truth and credit of his testimony; so, on the other hand, the object of the re-examination is, to give him an opportunity of showing the consistency of his statements, and of vindicating

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his character. Upon this subject, it is material to consider, how far the witness may be re-examined as to other parts of the same statement. If that which the witness has stated, in answer to the question on his cross-examination, arose out of the enquiries of the person, with whom he had the conversation, the witness may be asked in the re-examination what those inquiries were. (1) He may also be asked, what induced him to give to that person the account, which he has stated in the cross-examination. (1) The general rule is, that counsel have a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be themselves doubtful; and also an explanation of the motive, by which the witness was induced to use those expressions; he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motive of the witness. (1) And as many things may pass in one and the same conversation, relating to the subject of the conversation, which yet do not relate to his motive, or to the meaning of his expressions, the counsel are not entitled to re-examine to such parts of the conversation.

A distinction is to be made between a conversation, which a witness may have had with a *party to the suit*, and a conversation with a *third* person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to any thing that may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even the matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation, as evidence against a party, without giving to the party at the same time the benefit of

(1) See the account of the proceedings in the House of Lords, above referred to, p. 453, 454, of printed evidence, in the case of the witness Giuseppe Sacchi. 2 Brod. & Bing. 294, S. P.

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the entire residue of what he said on the same occasion. But the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit; it becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all that had constituted the motive and inducement, and all that may show the meaning of the words and declarations, has been laid before the court, the court becomes possessed of all that can affect the character or credit of the witness, and all beyond this is irrelevant and incompetent.*

Evidence in support of character.

In answer to the evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness, whose veracity has been thus impeached, it seems reasonable

* The question proposed to the Judges is not here inserted, because it is at once so abstract and particular, as not to be of much general importance. The reasons, above stated, are selected from the judgment of the Lord Chief Justice. Some difference of opinion occurred on this subject among the Judges. Mr. Justice Best differed in opinion from the other Judges; the Lord Chancellor also, and Lord Redesdale were of a different opinion. Mr. Justice Best held, that each of the proposed questions should be answered in the affirmative. His reasoning appears to have been to the following effect. The rule, which is acknowledged to have been settled with regard to the statements or conversations of a *party to the suit*, applies with equal reason and force to the statements and conversations of a *witness*. As, in the former case, if some part of the conversation, in which the party has been engaged, is brought forward, by the cross-examination, against that party, the whole of the conversation may be properly enquired into, on the re-examination; so, in the latter case also, if one part of the conversation of a witness has been drawn from him by cross-examination, with the view of disparaging his testimony, the whole of what passed in that conversation ought to be admitted on the re-examination. This is justly due to the character of the witness, who, having been attacked on the one side, is entitled, in vindication of his character, to have the entire conversation fairly and fully detailed in evidence: it is due to him also as a protection and security against proceedings, which might otherwise be instituted against him, on statements partially extracted by cross-examination. The witness cannot have a complete opportunity of explaining his motives, unless every part of the conversation may be enquired into; he may, in his cross-examination, have assigned some reason or motive for what he said in one part of the conversation, believing that reason or motive to be the only one, which operated upon his mind; yet, perhaps, if some other part of the conversation should be suggested to him in his re-examination, he may instantly discover, that some other motive also influenced him, or that what he said had been by some other incident, not before adverted to in the former examination. But although the entire conversation ought to be admitted, it is never to be admitted as evidence of any fact that may have been asserted in the course of the conversation, but solely and simply as explanatory of the witness's motives, and as setting his character and credit in a fair, full, and impartial point of view.

to be allowed to show, that he is a man of the strictest integrity, and of scrupulous regard to truth. Character.

Ch. B. Gilbert was of opinion, that the party, who called the witness, might show, that he affirmed the same thing before on other occasions, and that he is still consistent with himself.(1) This, however, has been doubted, and with good reason. Mr. Justice Buller lays it down, that such evidence is clearly not admissible in chief, and it seems doubtful, he adds, whether it is so in reply.(2) And Lord Ch. Justice Eyre is represented as having rejected such evidence, even when offered on behalf of a defendant, in a prosecution for perjury.* Former statement.

It may be observed, on this kind of evidence in general, that a representation without oath can scarcely be considered as any confirmation of a statement upon oath. It is the oath that confirms; and the bare assertion, that requires confirmation. The probability is, that in almost every case the witness who swears to certain facts at the trial, has been heard to assert the same facts before the trial; and it is not so much in support of his Remark.

(1) Gilb. Ev. 135. See Lutterel v. Reynell, 1 Mod. 282, and Sir J. Freind's case, 4 St. Tr. 613. 13 Howell's St. Tr. 32, S. C., and Harrison's case, 12 Howell's St Tr. 861, where this confirmatory evidence was offered in chief; which would not now be allowed.

(2) Bull. N. P. 294.

* So said by Lord Redesdale, in the Berkeley peerage case, 5th June, 1811. The occasion of the discussion, which took place, was as follows: One of the peers enquired of a witness, who had been cross-examined and re-examined, as to statements made by Lady Berkeley, on a former occasion, respecting her supposed marriage. The Solicitor-general suggested to the Committee, whether this was the regular course of proceeding, and stated what he conceived to be the general rule upon the subject. The admissibility of the former statements was then much discussed. After the arguments of counsel on both sides, Lord Redesdale said, he had always understood, that, for the purpose of impugning the testimony of a witness, his declarations at another time might be enquired into, but not for the purpose of confirming his evidence. And the Lord Chancellor expressed his decided opinion, that this was the true rule to be observed by the counsel in the cause; but considering the House as in some degree standing both in the situation of the counsel for the claimant, and of the counsel against the claimant, he was of opinion, that the question might be properly asked by the House, though it could not be asked by the counsel on one side; but with respect to the answer to the question, it might be the subject of future consideration, whether it ought to stand upon the minutes as evidence. The question respecting the former representations of Lady Berkeley was therefore repeated by one of the Lords, and the answer entered among the minutes, subject to future revision. MS.

character, that he has given the same account, as it would be to his discredit, that he should ever have made one different. The imputation on his veracity results from the fact of his having contradicted himself, and this is not in the least controverted or explained by the evidence in question. If a witness has made a statement a hundred times in one way, and a hundred times in another way directly contrary, the only inference must be, that he is utterly destitute of all title to credit. In one point of view, a former statement by the witness appears to be admissible, in confirmation of his evidence; and that is, where the counsel on the other side impute a design to misrepresent, from some motive of interest or relationship; there, indeed, in order to repel such an imputation, it might be proper to show, that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts.

Character of attesting witness deceased.

If an attesting witness to a will or deed impeach its validity on the ground of fraud, and accuse other subscribing witnesses, who are dead, of being accomplices in the fraud, the party, claiming under the instrument, may give evidence of their general good character. For, if living, they might be produced as witnesses, and their character might then be the subject of examination; and, after their death, an opportunity ought to be given, to show what credit is to be attached to their attestation. (1) The only mode left, in such a case, of doing justice to the person impeached, is by enquiring into his general character.

In the common case, where a witness for the plaintiff asserts one thing, and a witness for the defendant asserts another, and direct fraud is not imputed to either, evidence to general character is not admissible. (2) (*w*)

A party cannot discredit his own witness.

A party will not be permitted to produce *general* evidence, to discredit his own witness. (3) "This," says Mr. J. Buller,

(1) Doe dem. Walker v. Stephenson, 3 Esp. N. P. C. 284. 4 Esp. N. P. C. 50; cited and approved in 1 Campb. 210.

(2) Bp. of Durham v. Beaumont, 1 Campb. 207.

(3) Bull. N. P. 297.

(*w*) See Note 533, p. 771.

"would enable him to destroy the witness, if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit, if he spoke against him."(1) The meaning of this rule is, that a party cannot prove his own witness to be of such a general bad character, as would render him unworthy of credit.

1. By proof of bad character.

But if a witness state facts against the interest of the party that called him, another witness may be called by the same party to disprove those facts: "for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental only, and consequential."(2) The object of such evidence is to correct some supposed mis-statement, or to rectify an error; and if such evidence were to be excluded, the consequences would be most injurious to the administration of justice, as well in criminal as in civil cases. On the trial of an action, therefore, where the question was, whether the defendant's servant, who had been employed to sell a horse, had warranted him sound, and the servant swore, on being called by the plaintiff, that he had not given any warranty, Lord Ellenborough allowed the plaintiff to call another witness to prove, that at the time of the sale, the servant had expressly warranted its soundness. There can be no rule of law, said Lord Ellenborough, by which the truth on such an occasion is to be shut out, and justice perverted. (3)

Facts may be proved otherwise.

It would not, however, be competent to a party, in general, to prove, that a witness who has given evidence against the interests of that party, has been heard at other times to make a different representation. The earlier statement, it is clear, cannot, upon any principle, be substituted as legitimate proof of the fact therein affirmed, in the place of the statement delivered upon oath in the cause. Nor does it appear to be admissible, merely for the purpose of neutralizing or destroying the effect of

2. By proof of contradictory statement.

(1) Bull. N. P. 297.

(2) Bull. N. P. 297. 3 Barn. & Cress. 750, 751.

(3) Alexander v. Gibson, 2 Campb. 556. Richardson v. Alan, 2 Starkie, N. P. C. 334. Ewer v. Ambrose, 3 Barn. & Cress. 749. See also Lowe, v. Joliffe, and Pike v. Badmering, stated infra, Part II. ch. 8, sect. 2.

the latter unfavorable statement; for, generally speaking, any earlier statement, which may have been made, out of the cause, is entitled to much less weight than a subsequent statement, upon oath, in the cause, and in the presence of an opposite party, armed with the power of cross-examination. And one objection to such evidence is, that it would generally lead into a long collateral enquiry, which, after all, would seldom end in any certain or satisfactory result. A party, complaining of a supposed mis-statement of his witness, will always be at liberty to correct such mis-statement; but this is most directly and effectually done, and in a manner most convenient for the administration of justice, by producing other evidence as to the facts or circumstances supposed to be misrepresented.*

Answer.

In the case of Ewer v. Ambrose, before referred to,(1) a witness having been called on the part of the defendant, to prove a partnership between himself and the defendant, and having denied that fact, an answer of the witness in chancery was offered in evidence by the defendant's counsel, and admitted. But the Court of King's Bench were of opinion, that this answer was clearly not admissible for the purpose of showing generally that the witness was unworthy of credit; and they considered it very unquestionable, whether it could be properly received, to prove a different state of facts from that which the witness had sworn to at the trial. (*z*)

Deposition.

In Oldroyd's case, (2) one of the witnesses, whose name was on the back of the indictment, not having been called on the part of the prosecution, on account of a strong suspicion of being an accomplice with the prisoner,—the Judge directed that

(1) Barn. & Cress. 746. (2) Russ. & Ry. Cr. C. 89.

* On the impeachment of Warren Hastings, a witness, called by the managers, appearing to them to give his evidence less distinctly than when examined before the House of Commons, was interrogated as to the tenor of his evidence on the former occasion. The defendant's counsel objected to this course of examination; and the Lords, after argument, and much deliberation, determined that the question was irregular. The witness's name was Bean; the question occurred on the 29th Feb. 1788. See Mill's History of British India, vol. iii. p. 64.

(*z*) See Note 536, p. 781.

this witness should be examined; and as the evidence of the witness materially differed from a deposition taken before the coroner, the Judge ordered that this deposition should be read in evidence, for the purpose of impeaching the credit of the witness at the trial. And all the Judges, on considering the case, were of opinion, that it was competent for the Judge, under the circumstances, to order the deposition to be read for such purpose. And Lord Ellenborough C. J. and Mansfield C. J. thought, that the prosecutor had the same right to call for a deposition, in order to impeach the credit of a witness, who on the trial contradicted what he had before deposed. (*a*)

CHAP. IX.

Of Bills of Exceptions, and Demurrers to Evidence.

Bill of exceptions.

The competency of witnesses and the admissibility of evidence are to be decided by the Judge who tries the cause, and from his judgment there is an appeal by a bill of exceptions. An appeal also may be made, in the same manner, from the direction or opinion of the Judge, as to the sufficiency of the evidence to maintain the plaintiff's claim. (1)

13 Ed. 1.

At common law, a writ of error could not be brought for any error in law, which did not appear on the record; and therefore, where the plaintiff or defendant alleged any thing *ore tenus*, which was overruled by the Judge, the party aggrieved had no redress. (2) To remedy this defect, it was enacted by stat. 13 Ed. 1, ch. 31, "if one impleaded before any of the justices allege an exception, praying that the justices will allow it, that, if they will not, and if he write the exception, and require the justices to put their seals to it, the justices shall do so, and if one will not, another shall." (*b*)

Whether in criminal cases.

This statute extends to the plaintiff as well as to the defendant, (3) (*c*) and to a trial at bar as well as at nisi prius. (4) (*d*) But

(1) 1 Black. Rep. 556. Cowp. 161. As to the general nature of bills of exceptions, see Bull. N. P. 316, Tidd. Pr. 311.

(2) 2 Inst. 426.

(3) 2 Inst. 427.

(4) Thurston v. Slatford, 3 Salk. 155; Adm. per Cur. in Duchess of

(*a*) See Note 537, p. 782. (*b*) See Note 538, p. 782. (*c*) See Note 539, p. 783. (*d*) See Note 540, p. 783.

it has been doubted, whether it extends to criminal cases. Lord Coke, in his exposition of the statute, states, that it extends to all actions, real, personal, and mixed: but of criminal cases he makes no mention. In the case of Sir H. Vane, (1) who was tried for high treason, the Court refused to sign a bill of exceptions, "because," they said, "criminal cases were not within the statute, but only actions between party and party." From this authority, Mr. Serjt. Hawkins infers only that a bill of exceptions is not allowable on an indictment for treason or felony. (2) "Whether a bill lies not in any criminal case," said Lord Hardwicke, "is a point not settled." (3) It was allowed in the case of the King against Lord Pagot and others, on an indictment for a trespass, (4) and also on an information in the nature of a *quo warranto*. (5) But Lord Hardwicke, in the case before referred to, after saying "that he had known a bill of exceptions allowed in informations in the Court of Exchequer, which are civil suits for the king's debts," added, "It has never been determined to lie in mere criminal proceedings in other courts. (6)(*e*)

Quarter sessions.

A bill of exceptions cannot be allowed by the justices of the peace at the quarter sessions, on the hearing of an appeal against an order of removal. (7) (*f*) It can be used only on a writ of error, and therefore where a writ of error will not lie, there cannot be a bill of exceptions. (8) (*g*) And on the trial of a feigned issue out of a Court of Chancery, a party is not entitled to a bill of exceptions. (9) (*h*)

When tendered.

A party cannot avail himself of a bill of exceptions, unless he insist upon the exception at the trial. If he waves it, he acquiesces, and cannot resort back to the exception after a verdict. The statute appoints not any precise time for tendering a bill of exceptions; but the nature and reason of the thing re-

Grafton v. Holt, Skin. 354. R. v. Smith, 2 Show. 287, contra.

(1) 1 Lev. 68; Kel. 15, S. C. 1 Sid. 65, S. C.

(2) Pl. Cr. b. 2, c. 46, s. 210.

(3) R. v. Inhabitants of Preston, Rep. temp. Hard. 251.

(4) 1 Leon. 5.

(5) R. v. Higgins and others, 1 Ventr. 366. See also R. v. Nutt, 1 Barnardist. 307, a prosecution for a libel.

(6) Rep. temp. Hard. 251. R. v. Stratton and others, 21 Howell's St. Tr. 1187.

(7) See (2,) supra.

(8) Bull. N. P. 316.

(9) Bullen v. Mitchel, 2 Price, 416. Wood, B. dissent.

(*e*) See Note 541, p. 783. (*f*) See Note 542, p. 784. (*g*) See Note 543, p. 784. (*h*) See Note 544, p. 785.

quires, that the exception should be reduced to writing, when taken and disallowed: not that the exception need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record.(1)(*i*)

When a bill of exceptions has been tendered, the Court will not grant a motion for a new trial, unless the bill of exceptions be abandoned.(2)(*j*) And if a party, who has tendered a bill of exceptions, bring a writ of error, before he has procured the Judge's signature, he thereby waives the bill of exceptions, and will not be permitted afterwards to tack or append the bill to the writ of error.(3)(*k*)

Demurrer to evidence.

A demurrer to evidence is a proceeding, by which the judges, whose province it is to determine questions of law, are called upon to declare, what the law is upon the facts in evidence. And it is analogous to the demurrer upon facts alleged in pleading.(4)

Object of.

When the admissibility of the evidence has been established, the question, how far it conduces to the proof of the facts, which are to be ascertained, is not for the Judge to decide, but for the jury exclusively. And when the jury have ascertained the fact, if a question arises, whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact is in favor of one or other of the parties, that question is for the Judge to decide.(5) Ordinarily, he declares to the jury, what the law is upon the fact which they find, and then they compound their verdict of the law and fact. But if the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence.(6)

It is reasonable, that either party should have such a power of referring to the Court to decide, what the inference of law is upon the facts; as the jury may refuse to find a special verdict,

(1) By Holt, C. J. Wright v. Sharpe, 1 Salk. 288.
(2) 2 Chit. Rep. 272.
(3) Dillon v. Parker, 1 Bing. 17.
(4) See the judgment of Eyre, C. J. in Gibson and Johnson v. Hunter, 2 H. Bl. 205, 206.
(5) 2 H. Bl. 205.
(6) 2 H. Bl. 206. 2 Barn. & Cress. 443.

(*i*) See Note 545, p. 786. (*j*) See Note 546, p. 795. (*k*) See Note 547, p. 795.

What it admits.

in which case the facts would not appear on the record. On the other hand, as it is the peculiar province of the jury to ascertain the truth of facts and the credibility of witnesses, the party ought not to be allowed, by a demurrer to evidence, or any other means, to refer the trial of such questions to another tribunal. A demurrer must therefore admit the truth of all facts, which the jury might find in favor of the other party upon the evidence laid before them, whatever the nature of that evidence may be, whether of record, or in writing,(1) or by parol. (2) According to Alleyn's report of the case of Wright v. Pindar, it was resolved, "that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the Court; and if the matter of fact is uncertainly alleged, or it is doubtful whether it be true or no, because offered to be proved only by presumptions or probabilities, and the other party demurs thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the Court, that he may not be admitted to his demurrer, unless he will confess the matter of the fact to be true." And now it is an established rule, that in a demurrer to circumstantial evidence, the party, offering the evidence, is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion, which the proposed evidence conduces to prove.(3)(*l*)

When all matters of fact are admitted, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record, it will remain for the decision of the Judges.(4)

Not in the King's case.

If in an information, or any other suit, evidence be given for the King, and the defendant offers to demur upon it, the King's counsel cannot be compelled to join in demurrer, but in such case the Court ought to direct the jury to find the special matter; and upon that they shall adjudge the law.(5)

(1) Baker's case, 5 Co. Rep. 104. 2 H. Bl. 187. Cocksedge v. Fanshaw, 1 Doug. 119—134.
(2) Wright v. Pindar, Alleyn, 18. 2 H. Bl. 207.
(3) Gibson and Johnson v. Hunter, (4) 2 H. Bl. 208.
(5) 5 Co Rep. 104. Bull. N. P. 313.

(*l*) See Note 548, p. 796.

The whole proceeding upon a demurrer to evidence is under the control and direction of the Judge at nisi prius, or of the Court on a trial at bar. (1) The Court, said Mr. Justice Doddridge in the case of Worsley v. Filisker, (2) may deny and hinder a party from demurring, by overruling the matter in demurrer, if it seem to them to be clear in law: and, in that case, the Court did overrule the demurrer, and left the case to the jury. If the Judge overrule the demurrer improperly, that may be made the subject of a bill of exceptions. (3) (*m*)

Form of drawing up.

Where a demurrer to evidence is admitted, it is usual for the court or Judge to give orders to the associate to take a note of the testimony: this should be signed by the counsel on both sides; and the demurrer is then affixed to the postea. (4)

Assessment of damages.

Upon a demurrer to evidence, the damages may be assessed conditionally by the jury before they are discharged; or they may be assessed by another jury, upon a writ of enquiry, after the demurrer is determined. (5)

(1) 2 H. Bl. 208.
(2) 2 Roll. Rep. 119. Bull. N. P. 314. 2 H. Bl. 208.
(3) 2 H. Bl. 209.
(4) Bull. N. P. 313.
(5) Herbert v. Walters, 1 Ld. Ray. 60. Plowd. 410. Doug. 222, n.

(*m*) See Note 549, p. 798.

PART THE SECOND.

On Written Evidence.

The preceding chapters having treated of the competency of witnesses, and of parol or unwritten evidence, it is now proposed to enquire into the several kinds of written evidence.

Writings are either public or private. Some public writings are of record; others not of record. And public writings not of record may be distinguished into such as are of a judicial character, and such as are of a public nature but not judicial. In this order it is proposed to treat of the several kinds of written evidence; and to consider, first, in what cases they are admissible; secondly, if admitted, how they ought to be proved.

CHAP. I.

Of Acts of Parliament.

Records.

Records are the memorials of the proceedings of the legislature, and of the King's courts of justice, preserved in rolls of parchment; and they are considered of such authority, that no evidence is allowed to contradict them. (1) Thus, if a verdict, finding several issues, were to be produced in evidence, the opposite party would not be allowed to show, that no evidence was offered on one of the issues, and that the finding of the jury was endorsed on the postea by mistake. (2) On an indictment for assisting the escape of a convict out of prison, if the record of the conviction is produced by the proper officer, evidence is not admissible to dispute the statement in the record, or to show that it has

Effect, as evidence.

(1) Co. Litt. 117, b., 260, a. 12 221. Glynn v. Thorpe, 1 Barn. & Ald. 156. Rex v. Hopper, 3 Price, Rep. 24, 25. Doddridge's English Lawyer, p 200. Lamb. Just. B. 1, 495. c. 13, p. 71. Gilb. Ev. 5. Bull. N. P. (2) Reed v. Jackson, 1 East, 355.

never been filed among the other records of the country; even though the indictment refer to it with a *prout patet*, as remaining among those records. (1) An officer, who has the care and custody of records may be examined as to their condition, but he cannot be examined as to their matter or contents. (2) (*n*)

Conclusive, of what.

A record, then, is conclusive proof that the decision or judgment of the Court was, as is there stated; and evidence to contradict it will not be admitted. (*o*) But it will not be conclusive as to the truth of allegations, which were not material or traversable. (3) Thus, for example, a party will not be estopped from averring, in an action of debt on a bond, that the bond was made at A., though, in a former action upon the same bond, he averred it to have been made at B. (4) So, in the case of a conviction for felony, where the jury have given a general verdict, the record will not be conclusive, that the offence was committed on the day mentioned in the indictment, for the time is not of the substance of the charge; and, therefore, a party interested to dispute the forfeiture, (which, in the case of real property, relates to the time of the offence,) may falsify the record, and show that the offence was committed on another day. (5) But if the jury find specially the precise day, all parties are concluded. (6)

Acts of parliament.

The first sort of records, to be considered, are acts of parliament; and these, says Ch. B. Gilbert, are the highest and most absolute proof. Acts of parliament relate either to the kingdom at large, when they are called general acts; or only to particular classes of men, or to certain individuals, in which case they are called private acts. Laws which concern the King, or all lords of manors, or all officers in general, or all spiritual persons, or all traders, are public laws. But such as relate to the nobility only, or to spiritual lords, or to particular trades, are private acts. (7) (*p*) This distinction between public and private acts is not applied, in collections of the English Statutes at large, to any statutes previous to

Public.

Private.

(1) R. v. Shaw and others, 1 Russ. & Ry. Cr. C. 526.
(2) Leighton v. Leighton, 1 Str. 210.
(3) Co. Litt. 352, b.
(4) Com. Dig. tit. Estoppel, E. 6.
(5) Ive's case, 3 Inst. 230. Gilb. Ev. 230.
(6) Gilb. Ev. 230.
(7) Gilb. Ev. 39. 40.

(*n*) See Note 550, p. 799. (*o*) See Note 551, p. 799. (*p*) See Note 552, p. 801.

those of Richard the Third. From that period the distinction commences in the several tables prefixed to the respective collections. (1)

When judicially noticed.

The general rule is, that public acts of parliament are to be taken notice of judicially by courts of law, without being formally set forth; but particular or private acts are not regarded by the Judges, unless formally shown and pleaded. (2) (*q*) In some cases, however, the necessity of pleading a private act has been dispensed with; as, where there is a special clause, enabling the defendant, in answer to any action for matters done under the act, to plead the general issue; or, where the private act has been recognized by some public act of the legislature. Thus, the statute 23 H. 6, c. 9, relative to sheriff's bonds, (even supposing it in its original constitution to be a private act, as relating only to officers of a certain description, which, however, according to the best authorities, it is not,) must now be taken notice of judicially, because the statute 4 & 5 Ann. c. 16, s. 20, enables the sheriff to assign the bond, and thus makes it a general law. (3)

Preamble.

The preamble of an act of parliament, reciting, that certain outrages had been committed in particular parts of the kingdom, has been adjudged by the Court of King's Bench, in a late case, to be admissible in evidence, for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (4) (*r*) Public acts of parliament, it was said, are binding upon every subject; the Judges are bound to take judicial notice of their contents; every subject is, in judgment of law, privy to the making of them, and supposed to know them; the passing of an act of parliament is a public proceeding in all its stages, and when the act is passed, it is, in the contemplation of law, the act of the whole body of the kingdom. The Court of King's Bench, for these reasons, were of opinion, that the preamble in question had been properly admitted in evidence.

(1) See preface to new edition of Statutes at Large.
(2) Bull. N. P. 222.
(3) Saxby v. Kirkus, Bull. N. P. 224. Samuel v. Evans, 2 T. R. 575.
(4) R. v. Sutton, 4 Maule & Selw. 532.

(*q*) See Note 553, p. 802. (*r*) See Note 554, p. 802.

In many cases a defendant will be precluded, by the nature of the pleadings, from taking advantage of a public act of parliament. Thus, in an action of debt upon a bond, the defendant cannot, under the plea of *non est factum*, avail himself of the statute 13 Eliz. c. 8, s. 4, (1) which makes usurious contracts utterly void. (*s*) But if he pleads, that the bond was void on account of usury, he may insist upon the statute, though he has not formerly recited it. (2) In an action of assumpsit, indeed, where the defendant may give in evidence any thing that discharges the debt, or proves nothing due, he may show under the general issue, that the contract was usurious, (3) or founded on an illegal consideration, which makes the contract void. (4) (*t*) Act, when to be pleaded.

If an action or information be brought upon a penal statute, and there is another statute which exempts or discharges the defendant from the penalty, this latter act, as some books lay down the rule, cannot be given in evidence under the general issue, but ought to be pleaded; for the general issue is but a denial of the plaintiff's declaration, and the plaintiff, it is said, has proved him guilty, when he has proved him within the law, upon which he founds his declaration. (5) It is, indeed, enacted, by statute 21 Jac. 1, c. 4, s. 4, that in actions on penal statutes, it shall be lawful for the defendant to plead not guilty, or that he owes nothing, and to give in evidence such special matter, which, if pleaded, would have discharged the defendant at law: but this statute has been generally considered to attach only on antecedent penal laws, and not to extend to those subsequently enacted. (6) However, with respect to these also, it should seem, according to the modern practice, the defendant may plead *nil debet*, and give in evidence the statute; which would show that he does not owe the penalty. Thus, on a prosecution for exercising a trade contrary to the provisions of a statute, the defendant may show, under the general issue, that he is exempted from penalties by a subsequent statute. (7) And on the trial of Penal act.

(1) See also 12 Ann. st. 2, c. 16.
(2) Com. Dig. tit. Pleader, 2 W. 23.
(3) Ld. Bernard v. Saul, 1 Str. 498. Bull. N. P. 152, S. C.
(4) Adm. per Cur. in Hussey v. Jacob, 1 Ld. Raym. 89.
(5) 2 Roll. Ad. 683, pl. 13. Bull. N. P. 225.
(6) Gaul's case, 1 Salk. 372, Hicks's case, ib. 4 Burr. 2467. Bull. N. P. 196. French, q. t. v. Coxon, 2 Str. 1081. S. C. more fully stated in 2 Selw. N. P. 562, n. (117.)
(7) R. v. Pemberton, 1 Black. Rep. 230.

(*s*) See Note 555, p. 803. (*t*) See Note 556, p. 803.

an indictment against a parish for not repairing a highway, the defendants may, on the general issue, give in evidence an act of parliament, which exempts them from the repair, and transfers it to commissioners. (1) If the same act, which imposes the penalty, contains also the proviso of exemption, it is quite clear, that this proviso may be shown under the general issue. (2)

(1) R. v. Inhabitants of St. George, 8 Campb 222.
(2) Sutton v. Bishop, 4 Burr. 2284. Sibley v. Cunning, 4 Burr. 2469. Bull. N. P. 225.

CHAP. II.

Of Verdicts and Judgments of Courts of Record.

In treating of judicial proceedings, and enquiring in what cases they are admissible in evidence, it is proposed to consider, first, the verdicts and judgments of courts of record; secondly, the judgments of courts of exclusive jurisdiction; and, thirdly, certain other proceedings of an inferior kind.

The admissibility of verdicts and judgments of courts of record is the subject of the present chapter, in which will be considered, first, their admissibility, with reference to the parties in the suit; secondly, their admissibility, with reference to the subject-matter of the suit; thirdly, the admissibility, in civil cases, of verdicts, which have been given in criminal prosecutions.

Sect. I.

Of Verdicts and Judgments, with reference to the Parties in the Suit.

The general principles, which govern this subject, are clearly laid down in the celebrated judgment delivered by the Chief Justice De Grey, on a question referred to the Judges in the prosecution of the Duchess of Kingston. (1)

(1) 11 St. Tr. 261. 20 Howell's St. Tr. 538, S. C.

General rule.

"It is true, as a general principle," said the Chief Justice De Grey, in delivering the opinion of the Judges, "that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person, who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Hence the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding a fact, and the judgment of the court on facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers."(1)(*u*) To this general rule there are some exceptions, founded upon particular reasons, which will be stated in the course of the present chapter.

"From the variety of cases," continued Ch. J. De Grey, "relative to judgments being given in evidence in civil suits, these two deductions seem to follow, as generally true: first, that the judgment of a court of *concurrent* jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question in another court; secondly, that the judgment of a court of *exclusive* jurisdiction, directly upon the point, is in like manner conclusive upon the same matter coming incidentally in question in another court, between the same parties, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." (2)

Effect of judgment when pleaded.

First, then, a judgment directly upon the point, is, as a plea, a bar between the same parties. A party may be estopped by verdict on record: as, in an action of trespass, if the defendant prescribes for common, and the plaintiff traverses the prescription, the defendant may say, that in a former action by the

(1) Judgment of De Grey, C. J. in Dutchess of Kingston's case, 11 State Tr 261. 20 Howell's St. Tr. 538.

(2) 20 Howell's St. Tr. 538. 2 B. & C. 887. Vide infra, p. 329.

(*u*) See Note 557, p. 803.

plaintiff against the defendant, the same prescription was found against the plaintiff. (1)

Effect, when not pleaded.

A recovery in any suit, upon issue joined on matter of title, is conclusive upon the subject-matter of such title, if pleaded by way of estoppel; but, unless so pleaded, it will not be conclusive. (2) In Trevivan v. Lawrence, (3) it was held, that if a party will not rely on the estoppel, when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact.

Verdict for same cause of action.

In the late case of Vooght v. Winch, (4) an action on the case for widening a water-channel to the damage of the plaintiff's mill, the Court of King's Bench held, that a verdict obtained by the defendant in a former action, which had been brought by the plaintiff *for the same cause*, was admissible in evidence under the general issue, though not conclusive; the *judgment* would have been conclusive, if pleaded in bar by way of estoppel. When a judgment is pleaded as an estoppel, the plaintiff will not be allowed to discuss the case with the defendant, and for the second time to disturb and vex him by the agitation of the same question: but if the defendant plead not guilty in the second action, he has thereby elected to submit his case to the jury, who are to give their verdict upon the whole evidence submitted to them. (5) (*v*) The jury, upon the general issue, are to consider, not whether the plaintiff is estopped from trying the question, but whether the defendant be guilty of the wrongful act imputed to him. (6)

Estoppel, when.

Effect of verdict as evidence.

When a *judgment* is pleaded, it is proposed as something decisive and conclusive, as *res judicata*. When a *verdict* is

(1) Com. Dig. tit. Estoppel, (A. 1.) citing 1 Show. 28. The case is, Incledon and another v. Burgess. The doubt there was, whether this was a good estoppel as against a co-plaintiff, a stranger to the former action; and the Court gave judgment on another point. On this subject see the judgment of Lord Ellenborough in the case of Outram v. Morewood, 3 East, 354, 355.

(2) 3 East, 354, 365.

(3) Salk. 276, cited by Holroyd J. Barn. & Ald. 672.

(4) 2 Barn. & Ald. 662. The *cause of action* was the *same* in both cases: otherwise the verdict in the former case would not have been admissible. In assumpsit, the defendant may give in evidence, under the general issue, a recovery by the plaintiff in a former action for the same cause. Stafford v. Clark, 2 Bing. 377.

(5) By Ch. Justice Abbot, 2 Barn. & Ald. 668.

(6) By Bayley, J. ib. 669.

(*v*) See Note 558, p. 804.

offered in evidence, it is proposed on the same footing as the rest of the evidence in the cause, only as a medium of proof; and the credit due to it must depend upon the nature and circumstances of the particular case. It is merely the opinion of a former jury, upon the facts then laid before them, and with reference to the strength or weakness of the proofs on each side. But how their opinion was formed, upon what grounds it proceeded, or what means they had of judging, it is impossible to ascertain. No succeeding jury can be placed precisely in the situation of a former jury. In general, it may be remarked, we are apt to take this kind of proof too much in the gross, and give it too much weight in the scale of evidence.(*w*)

The *same parties*, who.

A judgment is not to be used as an estoppel against a party, who does not stand in the same relation or character, as in the former suit.(*x*) A woman is not estopped, after coverture, by an admission upon record by her husband and herself during coverture.(1) An heir, claiming as heir of his father, shall not be estopped by an estoppel upon him as heir to his mother.(2) A party suing as executor, in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, when he sued as administrator; but he may show that the letters of administration have been since repealed.(3) For the same reason, an acquittal of a person as accessary cannot be pleaded by him in bar, on a charge against him as principal; for the quality and nature of the offence are quite different.(4)

Heir.

Executor.

Accessary.

Evidence against one of several parties, when.

A verdict against two defendants will be evidence in an action upon the same subject-matter, against one of the defendants alone, if he alone was substantially interested in the former action, and the other defendant was joined with him merely for form. Thus, where a person brought an action of trover against a creditor and the sheriff, for goods levied under an execution, in which action the plaintiff failed, and afterwards he brought an action of assumpsit against the creditor alone, to recover the pro-

(1) Com. Dig. tit. Estoppel, (C.)
(2) Ibid.
(3) Robinson's case, 5 Rep. 32, b.
(4) 2 Hale, P. C. 244. Fost. Disc. 331.

(*w*) See Note 559, p. 811. (*x*) See Note 560, p. 811.

ceeds of the sale of the goods, the judgment in the first action was held to be a bar to the second action.(1)(*y*)

Who the *real parties.*

In considering the effect of verdicts and judgments, courts of justice will always take notice of the real parties to the suit.(*z*)

Ejectment.

In an action of ejectment, the lessor of the plaintiff and the tenant in possession are judicially considered the real parties.(2)(*a*) For the same reason, in the case of Kinnersley v. Orpe,(3) which was an action for a penalty, incurred by destroying fish in the plaintiff's fishery, a verdict for the plaintiff in a former action, for a trespass committed in the same fishery, against one who justified as servant, was allowed to be evidence against the defendant. At the trial of the cause, this was admitted, as conclusive evidence of the plaintiff's right of fishery; as it appeared, that the defendant in the second suit acted by the command of the same person, under whom the defendant in the first action had justified, and who was considered by the judge to be the true party in both causes. The Court of King's Bench, afterwards, on a motion for a new trial, considered the evidence admissible, though not conclusive.(*b*)

Plea of justification, in right of another.

Verdict or judgment between *privies.*

Estoppels by verdict, admissions on record, &c. bind privies in blood, (as the heir,) privies in estate, (as feoffee, lessee, &c.) and privies in law (as lord by escheat, tenant by curtesy, tenant in dower, the incumbent of a benefice, and others who come in by act of law in the *post;*) in the same manner, persons standing in either of these relations will be bound, equally with the parties themselves, by a judgment in a former action for the same matter, if pleaded in bar.(4)

Privies.

A verdict or judgment in a former action, upon the same matter directly in question, is evidence for or against privies in blood, privies in estate, and privies in law, as well as for or against the parties to the suit.(*c*).

1. In blood.

If an ancestor has obtained a verdict, the heir may give it in evidence, as privy to it.(5)(*d*) If

(1) Hitchin v. Campbell, 2 Black. Rep. 827.
(2) Aslin v. Parkin, 2 Burr. 668.
(3) 2 Doug. 517. See the observation on this case, in Outram v. Morewood, 3 East, 366. And see Hancock v. Welch, infra, p. 332.
(4) Co. lit. 352, *a.* Com. Dig. tit. Estoppel (B) Outram v. Morewood, 3 East, 346. Lady Dartmouth v. Roberts, 16 East, 334.
(5) Per Cur. in Lock v. Norborne, 3 Mod. Rep. 142.

(*y*) See Note 561, p. 811. (*z*) See Note 562, p. 812. (*a*) See Note 563, p. 812.
(*b*) See Note 564, p. 812. (*c*) See Note 565, p. 813. (*d*) See Note 566, p. 813.

several estates in remainder be limited in a deed, and one of the parties in remainder obtain a verdict, in an action brought against him for part of the land, that verdict may be given in evidence by another person in remainder, in an action brought against him for the same land, although he does not claim any estate under the first remainder-man; because they all claim under the same deed. (1) So, a verdict for or against a lessee is evidence for or against a reversioner. (2) (*e*) 2. In estate.

A verdict on a question of tithes, between a vicar and an occupier of land in the parish, is evidence between him and another occupier, the vicar in both suits claiming the same general right to tithes. (3) And a decree, in the Court of Exchequer, in a cause between the vicar on one side, and the impropriator on the other, (establishing the vicar's title to small tithes, under an ancient endowment, against the defendant, who insisted that he was only entitled to an annual payment in lieu of tithes,) is evidence in suits between succeeding vicars and patrons; but not conclusive evidence, as it would be, if the ordinary had been a party to the first suit. (4) So, a judgment for or against the schoolmaster of a hospital, concerning the rights of his office, has been admitted to be evidence for or against his successor. (5) And so, where, on an information in the nature of *quo warranto* against the defendant, for acting as bailiff of a corporation, the defendant pleaded, that he had been duly elected under a nomination by two persons, who were bailiffs of the corporation, and the point in issue was, whether they were bailiffs at the time of the election, the record of a judgment of ouster in a *quo warranto* against them, was adjudged to be good evidence against the defendant, who claimed under them. (6)* These 3. Privy in law.

Vicar, or rector.

Successor in office.

(1) Pyke v. Crouch, 1 Ld. Raym. 730. Com. Dig. tit. Evidence, (A. 5.) Bull. N. P. 232.

(2) Per Cur. in Rushworth v. Countess of Pembroke and Currier, Hardr. 472. Com. Dig. tit. Evidence (A. 5) Bull. N. P. 232. Gilb. Ev. 35, 36. Bp. of Lincoln v. Sir W. Ellis, 2 Gwill. 632.

(3) Travis v. Chaloner, 3 Gwill. 1237. And see Ashby v. Power, 2 Gwill. 1239. Benson v. Olive, 2 Gwill. 701.

(4) Carr v. Heaton, 3 Gwill. 1261.

(5) Lord Brounker v. Sir R. Atkins, Skin. 15.

(6) R. v. Hebden, Andr. 388; 2 Str. 1169, S. C. Bull. N. P. 231, S. C.; 2 Selw. N. P. 1047, cited from MS. R. v. Grimes, 5 Burr. 2601, S. P.

* Judgment of ouster has been considered in the nature of a judgment *in rem*. In the case of the King v. the Mayor of York, 5 T. R. 72 where

(*e*) See Note 567, p. 813.

cases fully establish the rule above laid down, that a verdict or judgment directly upon the point is good evidence, not only for or against the parties to the suit, but also for or against any persons standing in the relation before mentioned, of privies in blood, privies in estate, or privies in law. (*f*)

Verdict, not evidence against a stranger.

The general rule is, that a verdict cannot be evidence for either party, in an action against one who was a stranger to the former proceeding, who had no opportunity to examine witnesses, or to defend himself, or to appeal against the judgment. (*g*) Thus a verdict in an action between A. and B. is not evidence against a third person, C., who was neither party nor privy to the first suit. The case of Green v. The New River Company, (1) where Lord Kenyon said, that a verdict obtained in an action against a person for the negligence of his servant, is evidence in a subsequent action by the master against the servant, as to the quantum of damages, is not an exception to the general rule. Such a verdict would not be evidence of the fact of the injury, but admissible only as evidence of special damages, to show the amount of what the master was by process of law compelled to pay in the action brought against himself. (*h*)

Evidence, as to damages recovered.

Nor, for a stranger.

It is laid down, also, as a general rule, that a verdict is not evidence for a stranger, against one who was a party to the former suit. Thus, it was resolved by Ch. J. Holt and the other Judges of the Court, on a trial at bar, that no record of conviction, or verdict, can be given in evidence, but such whereof the benefit may be mutual, that is, such as might have been given in evidence either by the plaintiff or the defendant. (2) And Ch. B. Gilbert lays it down, "that no body can take benefit by a verdict, who had not been prejudiced by it had it

(1) 4 T. R. 590. And see 2 East, 459. As to the general principle, see 2 Price, 434.

(2) R. v. Warden of the Fleet, Rep. temp. Holt, 134. Bull. N. P. 233, S. P.

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the case of R. v. Hebden and R. v. Grimes were cited in argument, in order to show, that such a judgment cannot be conclusive against third persons, Lord Kenyon is reported to have said, "If you derive title to a corporate office through A., and the prosecutor show a judgment of ouster, against A., it is conclusive against you, unless you can impeach the judgment as obtained by fraud.

(*f*) See Note 568, p. 814. (*g*) See Note 569, p. 815. (*h*) See Note 570, p. 816

gone contrary." (1) (*i*) The same rule applies to depositions as well as to verdicts. Thus, if A. prefers his bill against B., and B. exhibits his bill against A. and C. in relation to the same matter, and a trial at law is directed, C. cannot give in evidence the depositions in the cause between A. and B., but the trial must be entirely as of a new cause. (2) (*j*) Depositions.

The reason why a verdict is not evidence against a person, who was neither a party to the former suit, nor claims under one of the parties, is, because he had no opportunity of calling witnesses, or of cross-examining those on the other side, nor of appealing against the judgment. (*k*) And the reason why the verdict would not be evidence for a stranger, even against a party who was engaged in the former suit, seems to be, because, if he had been party to that suit, instead of the person who gained the verdict, the result might have been different; for, as the parties would in that case have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of a doubtful character, or, perhaps, other evidence might have been produced by the party who lost the verdict. Under such circumstances, to admit a verdict as evidence would be giving a party indirectly the benefit of testimony, which he might be precluded from using directly in his own suit. (*l*) But this reason, it is evident, only applies where the verdict is offered in evidence by a third person, against the party who failed in the former action, and not where it is produced against the party who succeeded. (*m*) Reason of the rule.

There are several exceptions to the general rule, above laid down, which requires that verdicts or judgments should be admitted in evidence only between the original parties to the suit, or their privies. Exceptions to the rule.

1. On a question of custom, or toll, a verdict is evidence, although between other parties; (3) for the custom or toll is 1. Verdict as to customs, tolls, &c.

(1) Gilb. Ev. 28. Bull. N. P. 232. Ward v. Wilkinson, 4 Barn. & Ald. 412. The same principle is adopted by Eyre C. J. in his judgment in the Dutchess of Kingston's case, 11 St. Tr. 261.

(2) Rushworth v. Countess of Pembroke and Currier, Hardr. 472.

(3) City of London v. Clarke, Carth. 181. Bull. N. P. 233.

(*i*) See Note 571, p. 818. (*j*) See Note 572, p. 818. (*k*) See Note 573, p. 819. (*l*) See Note 574, p. 819. (*m*) See Note 575, p. 819.

lex loci, and it is as reasonable to give in evidence a verdict between other parties, as to prove a payment of the duty by strangers. So, on a question of customary right of common, (1) or a public right of way, (2) (*n*) or on the liability to repair a highway, (3) (*o*) or on manorial or other customs, (4) or on the public right of election to a parochial office, (5) a verdict in a former action between any other persons is admissible in evidence. The common reputation of the place would be evidence of the right; *a fortiori* the finding of twelve men upon their oath's is evidence. (6) (*p*) On such questions, therefore, a verdict in an action between A. and B. is evidence of the point, there directly determined, in an action between C. and D., where the same point comes in issue; but it is clearly not conclusive evidence for or against A. or B., in an action between either of them and a third person, C.; (8) it could not be pleaded in such a case, by way of estoppel.

On question of pedigree.

Another exception to the general rule, says Mr. Justice Buller, is in a question of pedigree, where a special verdict between other parties, finding a pedigree, would be evidence to prove a descent; for in such case, what any of the family, who are dead, have been heard to say, or the general reputation of the family, entries in family books, &c. are allowed. (9) (*q*)

2. Judgment of courts of exclusive jurisdiction.

2. A judgment *in rem* in the Exchequer is conclusive as to all the world. (10) The sentence of a Court of Admiralty is equally conclusive upon all persons. So is the sentence of ecclesiastical courts in some few particular instances, in which they

(1) 1 East, 357. 5 T. R 413, n.
(2) Reed v. Jackson, 1 East, 355.
(3) R. v. St. Pancras, Peake, N. P. C. 219.
(4) By Holt, Ch. J., Carth 181. Case of the Manchester Mills, cited in Cort v. Kirkbeck, 1 Doug. 222, n. (15.)
(5) Berry v. Banner, Peake, N. P. C. 156
(6) By Lawrence J., 1 East, 357. Gilb. Ev. 31
(7) Biddulph v. Ather, 2 Wils. 23.
(8) See the cases above cited, and see Mayor of Hull v. Horner, Cowp. 111, ad fin.
(9) Bull. N. P. 233. "Of this opinion," the writer adds, "was Mr. Justice Wright, in the Duke of Athol's case, which opinion is generally approved, though the determination of the rest of the Court was contrary." The other Judges considered the special verdict inadmissible, as *res inter alios acta;* and, for any thing they knew to the contrary, the same evidence, that was laid before the former jury, might have been then produced. See Neal v. D. of Athol, 2 Str. 1151.
(10) See infra, c. 3, s 3. And see R. v. Hebden, supra, p. 325.

(*n*) See Note 576, p. 819. (*o*) See Note 577, p. 819. (*p*) See Note 578, p. 820. (*q*) See Note 579, p. 820.

have an exclusive jurisdiction. This subject will be fully considered in a subsequent section. (*r*)

3. A judgment of a court of quarter sessions, *discharging* an order of removal, (not for defect of form but upon the merits, is conclusive as between the contending parishes, (but not as to a *third* parish,) to establish this, that the settlement of the pauper was not in the appellant parish at the time of the removal. (1) So, that if the same pauper were to be again removed from the one parish to the other, the former judgment would negative and disprove his settlement in the appellant parish, so late as the period of the former removal. Or if a woman were to be removed from the one parish to the other, as his wife, the former judgment would be conclusive, on an appeal against her removal between the same parishes, that the husband was not settled there at the time of the prior order. So, if the respondents should prove a derivative settlement for the pauper from his *father*, it would be competent to the appellants to show, that the father was removed from the respondent parish to their parish, as his place of settlement, and that the order for his removal was reversed; such evidence would be admissible on account of the privity between father and child as to the child's settlement, and would be conclusive to the extent above stated. But it would not be competent to show that the pauper's *brother* was removed, and the order of removal reversed; for here there is not such privity, and though the settlement proved for the pauper should be one derived from the common father, yet as the father's settlement must have come into question on the former appeal, (if it came into question at all,) only collaterally and incidentally, the judgment in the former appeal would not be, respecting the *brother's* settlement, admissible evidence on the part of the appellant, in answer to such derivative settlement. (2)

3. Judgment of q. sess. in appeals.

Order discharged.

Its effect, in *disproving* a settlement, as to *appellant* parish.

Privity to person removed.

It will be competent to the respondent to prove, in reply, that the judgment in the former appeal, reversing the order of removal of the pauper, was given, not on inquiring into the set-

(1) R. v. Sarratt, Burr. S. C. 73. Harrow v. Rislip, Salk. 524.

(2) R. v. Knaptoft, 2 Barn. & Cress. 883. The respondents here proved a *prima facie* case of settlement, by proof of relief to the pauper.

(*r*) See Note 580, p. 820.

tlement, but on the preliminary objection, that the pauper was not chargeable. (1)

Effect as to *removing* parish.

It appears to be clear, from considering the language and nature of an order of removal, and the nature of judgments in appeals against such orders, that a judgment reversing an order of removal from A. to B., ascertaining nothing but his negative proposition, namely, that at a certain time the pauper was not settled in B., the *appellant* parish, and upon this point it is conclusive in any future appeal between the same parishes. But this judgment determines nothing affirmatively with regard to the *removing* parish. If, therefore, afterwards B. should remove the same pauper to A., and A. should appeal, that judgment could not be used by B. as evidence of the pauper's settlement in A.: that judgment itself professes nothing upon that point, and affords not the least reason even for supposing, that a settlement in A. was ever any part of the subject of inquiry. It finds the *negative*, that there was no settlement in B.: but as to the *affirmative* proposition, of a settlement ever having been in A., such a judgment is a mere blank, and supplies no kind of information.

Order confirmed.

An order of removal, executed and not appealed against, (2) or confirmed on appeal, (3) is conclusive of the pauper's settlement at the time of the order, even as between third parishes, who were not parties to that order. It is conclusive upon the appellant parish as to all the world, on any subsequent appeal: And conclusive not only of the settlement of the persons named in the order, but also as to children not included by name. (4) Here, it may be observed, the party, against whom the judgment was pronounced, had an opportunity of discharging themselves by proving the liability on a third parish; and this not having been done, and the court of quarter sessions having confirmed the order of removal, the last settlement is adjudged to be in the appellant parish; and this point being once deter-

(1) R. v. Wheelock, 5 Barn. & Cress 511.

(2) R. v. Cennelworth, 2 T. R. 598. R. v. Corsham, 11 East, 388.

(3) Admitted, R. v. Rislip, 2 Bott, 700. R. v. Bentley, 2 Bott, 704. R. v. Sarratt, 2 Bott, 702.

(4) R. v. St. Mary, Lambeth, 6 T. R. 615. R. v. Catteral, 6 Maule & Selw. 83.

mined, the judgment must be final, that there must be some end to litigation.(1)

4. Criminal proceedings, on which a person has been attainted, are between the king and the party only, but they are evidence, as was before mentioned, to prove the attainder, between all parties, and on all occasions. A conviction and judgment prove the incompetency of a witness; the reversal of the judgment, on a writ of error, restores his competency.(2)(*s*) 4. Criminal proceedings.

A record of conviction for felony is admissible in evidence against an accessary, to show that the felony has been committed by a person convicted as principal.(3) These facts, the conviction of the principal has established with certainty, at least sufficient to put the accessary to his answer. The rule is founded on a legal presumption, that every thing in a former proceeding was rightly and properly transacted. Another weighty reason, says Mr. Justice Foster, is, that the witness against the principal may be dead, or not to be found, when the accessary is brought upon his trial, especially after a long interval between the trials. It is admitted, however, that the record of conviction is not conclusive evidence against the accessary, because it is as to him *res inter alios acta.*(*t*) Conviction of principal.

A record of conviction on an indictment against a parish, for not repairing a road, seems to have been held to be conclusive evidence of the non-liability of another parish indicted for not repairing the same road; at least, it is strong evidence.(4) If it can be shown, that fraud has been practised in obtaining the former verdict, this would vitiate the judgment. Fraud, as it has been observed,(5) is only put for an example. If the parish consists of several districts, which have immemorially repaired the For non-repairing of highways.

(1) By Holt, C. J., in R. v. Rislip, 2 Salk. 524. 2 Bott, 705.

(2) See ante, p. 31, Lord Lovat's case.

(3) Fost. Disc. iii, c. 2, s. 2, pp. 364, 365, 367. R. v. Smith, 1 Leach, Cr. C. 288. Though the judgment on the record is drawn up irregularly, and erroneous, proof of the conviction will be sufficient. R. v. Baldwin, 3 Campb. 265. The attainder against the principal stands, till it is reversed, 9 Rep. 119, a. b.

(4) R. v. St. Pancras, Peak, N P. C. 219, by Lord Kenyon. Upon the subject of the admissibility of convictions as evidence in civil cases, see infra, sect. 3.

(5) 2 Saund. 159, a., note by the editor.

(*s*) See Note 581, p. 820. (*t*) See Note 582, p. 820.

respective highway lying within them, and if the districts, in which the road indicated is not situate, can show that they had no notice of the former indictment (the defence having been made and conducted entirely by the district within which the road lies,) the Court will consider the indictment as being substantially against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in the parish.(1)

Judgment evidence by way of inducement.

Proof of title.

A judgment is evidence, in many cases, for or against parties who were strangers to the former suit, when offered as proof of a collateral fact, by way of inducement to the action. Thus, where a party claims under an execution, the judgment in the former suit, under which the execution issued, is part of his title, and admissible in evidence, though the other party may be a stranger to that suit. So, if a record of conviction or attainder is part of a title, it is admissible in evidence, as such, between other parties.

Proof of damage.

Where the defendant is liable to pay the amount of damages, which a third person has recovered in a suit against the plaintiff, the verdict in that suit will be evidence to prove the amount.(2)(*u*)

Replevin.

In an action of assumpsit by A. against B., for a rent due from a certain day, it has been held that a judgment in an action of replevin between B. and C., (in which C. made cognizance as bailiff of A., and one of the issues found against B. in that action was, that he held the premises at the time of the distress, as assignee of the original tenant, a bankrupt,) is evidence of B.'s tenancy.(3)(*v*)

Tenancy.

Assumpsit.

In assumpsit, for goods sold and delivered against two defendants (one of whom suffered judgment by default, and the other defended,) the question at the trial was, whether the defendants were partners at the time when the goods had been delivered. Lord Kenyon held, that a verdict on an issue, directed by the Court of Exchequer, to try the fact of partnership, was con-

(1) R. v. Townsend, 1 Doug. 421. R v. Eardisland, 2 Campb. 494

(2) On this account the defendant would not have been a competent witness in a former suit. See Green v. N. R. Company, supra, p. 326, and other cases there cited.

(3) Hancock v. Welch and Cooper, 1 Starkie, N. P. C. 347. Lord Ellenborough held it to be conclusive.

(*u*) See Note 583, p. 821. (*v*) See Note 584, p. 824.

clusive evidence of a subsisting partnership, and that it could not properly be deemed *res inter alios acta*, as both the defendants had been the parties on record in that suit, and it was open to either of them by any evidence to rebut the idea of a partnership. (1) (*w*)

Sect. II.

Of Judgments, with reference to the Subject-matter of the Suit.

General rule.

The general rule laid down in Chief Justice Eyre's judgment in the Dutchess of Kingston's case is, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question in another court. (2) (*x*) But it is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. (3) (*y*)

Bar to other actions.

It is a bar to any other action of the same nature as the first. (4) By actions of the same nature, is meant actions in a similar degree; not merely those which have a similitude of form. All personal actions are of the same degree; therefore each is a perpetual bar. (5) Thus, a judgment in an action of debt is a bar in an action of assumpsit on the same contract. (6) And a judgment in trespass, when the right of property is determined, will be a bar in trover for the same taking. (7) So, a verdict for the defendant in trover is a bar in an action for money had and received, for the money arising from the sale of the same goods. (8) (*z*) One great criterion for trying whether the matter or cause of action be the same, is, that the same evidence

(1) Whateley v. Menheim and Levy, 2 Esp. N. P. C. 608. And see Lowfield v. Bencroft, Bull. N. P. 40. 2 New Rep. 371.
(2) See ante, p. 321.
(3) Judgment in Dutchess of Kingston's case, 20 Howell, 538.
(4) Ferrar's case, 6 Rep. 7; Cro. El. 667, S. C. Sparry's case, 5 Rep. 61. Hitchin v. Campbell, 2 Black. Rep. 827, 831.
(5) 2 Black. Rep. 831.
(6) Slade's case, 4 Rep. 94. Com. Dig. tit. Action, (K. 3.)
(7) Com. Dig. ib. Putt v. Roster, 2 Mod. 319. 3 Mod. 1, S. C. Sir T. Raym. 472, S. C. 2 Black. Rep. 831.
(8) Hitchin v. Campbell, 2 Black. Rep. 827.

(*w*) See Note 585, p. 824. (*x*) See Note 586, p. 824. (*y*) See Note 587, p. 826. (*z*) See Note 588, p. 828.

will maintain both the actions. But where the plaintiff failed in his first suit, on account of some defect in pleading, or from having mistaken the form of action, the judgment will not be conclusive, and he may bring another action to try the same right. (1) (*a*)

Several causes of action, only part proved.

If the plaintiff on the trial of his action attempted to prove a demand against the defendant, and failed in the attempt, he cannot set it up again in a second action. But if he omitted to give any evidence of the demand on the former occasion, though he had an opportunity of doing so, he is not precluded from doing it afterwards. Thus, when the plaintiff in a former action declared on a promissory note and for goods sold, but, upon executing a writ of enquiry after judgment by default, gave no evidence on the count of goods sold, the judgment was not a bar to his recovering for the goods in another action. (2) (*b*) So, it has been held, that an award, made on a reference of all matters in difference between the parties, is no bar to any cause of action, which the plaintiff had against the defendant at the time of the reference, if it appear that the subject-matter of the action was not enquired into before the arbitrator. (3) (*c*)

Award.

If, in the case of Seddon v. Tutop, above stated, the plaintiff had given any evidence at all on the account for goods sold, and the verdict had included this with the rest of the plaintiff's demand, the judgment might then have been pleaded as a judgment recovered upon the same identical causes of action. (4) (*d*)

Effect of judgment or verdict.

In considering the effect of a former judgment, it is to be observed, that the judgment can be final only for its own proper purpose and object, with reference to the subject matter of the suit, and upon the points there put in issue and directly determined. (*e*) Therefore, in an action for obstructing a watercourse, where a verdict for the plaintiff in a former action, which had been brought against the defendant for another obstruction to the same watercourse, was offered in evidence under the general

(1) Robinson's case, 5 Rep. 33. 6 Rep. 8, a. Com. Dig. tit. Action, (L. 4.) 2 Black. Rep. 831.
(2) Seddon v. Tutop, 6 T. R. 607.
(3) Ravee v. Farmer, 4 T. R. 146. Martin v. Thornton, 4 Esp. N. C. P. 180.
(4) See Lord Bagot v. Williams, 3 Barn. & Cress 235, 240.

(*a*) See Note 589, p. 834. (*b*) See Note 590, p. 837. (*c*) See Note 591, p 840 (*d*) See Note 592, p. 841. (*e*) See Note 593, p. 843.

issue, Lord Mansfield held, that the plaintiff had not obtained such a determination of his right by the former verdict, as the law considered conclusive. It could only be conclusive upon the right, if it could have been used and were actually used in pleading, by way of estoppel, which it could not be in that case. (1) (*f*)

A verdict for the defendant, in an action on the case for widening a watercourse, is admissible evidence, under the general issue in a second suit for the same cause of action, but is not conclusive. (2) (*g*) And a recovery by the plaintiff in a former action of assumpsit may be given in evidence on the part of the defendant, under the general issue, in a subsequent suit for the same cause of action. (3) (*h*)

Real, personal, actions.

There is a difference, it has been said, between real actions and personal actions, as to the conclusiveness of a judgment. "In a personal action, as debt, account, &c. the bar is perpetual; for the plaintiff cannot have an action of a higher nature, and has no remedy but by error or attaint. (4) But if the plaintiff be barred in a real action by judgment on a verdict, demurrer, confession, &c., yet he may have an action of a higher nature, and try the same right again; because it concerns the freehold and inheritance." (5) Now, although it is true that the same matter may be thus tried again, yet the former judgment is no less conclusive upon the immediate right then in demand, as far as that former judgment purports to bind, and against all such persons as it is competent by law to bind. A judgment is final for its own proper purpose and object, and no further. A recovery in any suit, upon issue joined on matter of title, is conclusive upon the subject-matter. Thus, a finding upon title in trespass, not only operates as a bar to the future recovery of damages for a trespass founded upon the same injury, but operates also as an estoppel to any action, for an injury to the same supposed right of possession. (6) (*i*)

Judgment, when final.

(1) Sir F. Evelyn v. Haynes, cited in Outram v Morewood, 3 East, 365. And see Cross v. Salter, 3 T. R. 639. Sintzenick v. Lucas, 1 Esp. N. P. C. 43.

(2) Vooght v. Winch, 2 Barn. & Ald. 662.

(3) Stafford v. Clark, 2 Bing. 377.

(4) Ferrer's case, 6 Rep. 7, 1st Res.

(5) See the judgment in Outram v. Morewood, 3 East, 359.

(6) Ib. 354.

(*f*) See Note 594, p. 844. (*g*) See Note 595, p. 848. (*h*) See Note 596, p. 849. (*i*) See Note 597, p. 849.

Judgment in ejectment.

A judgment in one action of ejectment is not conclusive in another, in consequence of the fictitious nature of the proceedings. However, it is conclusive evidence of the plaintiff's title against the tenant in possession, in an action for mesne profits; for the plaintiff, to entitle himself to recover in an ejectment, must show a possessory right not barred by the statute of limitations. This judgment, like all others, only concludes the parties, as to the subject-matter. It proves nothing beyond the time laid in the demise; because beyond that time the plaintiff has alleged no title, nor could be put to prove any. As to the length of time, also, during which the tenant has occupied, or as to the value, the judgment proves nothing, for the same reason. (1) (*j*)

Sect. III.

Admissibility in Civil Cases, of Verdicts in Criminal Proceedings.

It appears to be a general rule, that a verdict in a criminal proceeding is not admissible in an action as proof of the fact, which is the subject-matter of the suit.

The objections against the admissibility of such evidence seems to be, first, that the parties are not the same in the civil suit; as in the criminal case; and, secondly, that the party in the civil suit, on whose behalf the evidence is supposed to be offered, might have been a witness on the prosecution: but the first of these is the principal objection. (*k*)

Sentence in ecclesiastical court.

In the case of Hildyard and Grantham, (2) which was an issue directed by the Court of Chancery, to try a question of legitimacy, a sentence against the supposed father and mother, upon a proceeding against them in the consistory Court of Lincoln, for living together in fornication, was offered in evidence, to prove that they were not married: but the whole Court of King's Bench were of opinion, on a trial at bar, that the sen-

(1) Aslin v. Parkin, 2 Barr. 668. See Hunter v. Britts, 3 Campb. 455, as to the effect of a judgment against the casual ejector.

(2) Cited by Lord Hardwick in Brownsord v. Edwards, 2 Ves. 246, and in Rep. temp. Hard. 311.

(*j*) See Note 598, p. 849. (*k*) See Note 599, p. 850.

tence could not be given in evidence; "because, first, it was a criminal matter, and could not be given in evidence in a civil cause; next, because it was *res inter alios acta*, and could not affect the issue; but they held, that if it had been a sentence on the point of marriage, in a question on the lawfulness of the marriage, it might have been given in evidence, being the sentence of a court having proper jurisdiction."

Record of conviction.

In the case of Gibson v. Maccarty, (1) on an issue to try the genuineness of some promissory notes, depositions of a deceased witness having been read on the part of the plaintiff, (in which depositions the witness swore, that the defendant had acknowledged the notes in question and also another note,) it was proposed, on the part of the defendant, to show by a record of conviction, that the plaintiff had since been convicted of forging this other note, mentioned by the deponent; for such evidence, it was said, would go to the credit of the deponent's evidence, as to the acknowledgment of the notes in question; and, secondly, because there is at all times a liberty given to examine into the plaintiff's character. But this evidence was opposed on the part of the plaintiff, on the ground, that no record of a criminal action can be given in evidence in a civil suit, because such a conviction might have been upon the evidence of a party interested in the civil action; and Lord Hardwicke is reported to have said, "that the general rule was as had been stated by the plaintiff's counsel, (2) and that it had been so strictly kept, that in the case of Hillyards, on a question of legitimacy, the Court refused to admit a sentence of excommunication in the spiritual court, for fornication between the father and mother of the party, whose legitimacy was impeached."

Coroner's inquest.

Upon an issue to try the question of devise or no devise, a coroner's inquest, finding the deceased a lunatic, was offered in evidence against the plaintiff, who claimed as executrix, for the purpose of showing, that the deceased was incompetent to make a will; this evidence was objected to on the part of the plaintiff, and the Court, were equally divided in opinion. The Chief Justice (Parker) was of opinion that the inquest ought to be

(1) Rep temp. Hard. 311.
(2) Acc. by Sir J. Mansfield, C. J. in Hathaway v. Barrow and others, 1 Campb 151. See also, 12 Mod. 337.

admitted, "because it was for the plaintiff's advantage, as the personal estate would be saved by the finding of lunacy;" and he added, that in Lord Derby's case an inquest *post mortem* was allowed to be given in evidence. Mr. Justice Powys agreed with the Chief Justice. Mr. Justice Eyre said, "This is a criminal matter, and ought not to be given in evidence in a civil proceeding. A verdict on an indictment for battery cannot be read in an action for the same battery. An inquest *post mortem* is in the nature of a civil proceeding; but this is criminal, for it might induce a forfeiture of the goods, if he had been found *felo de se*." And Mr. Justice Pratt said, "If a verdict be given in evidence, it must be between the same parties, and, therefore, an indictment at the suit of the king cannot be read in an action at the suit of the party."

Acquittal of assault.

A verdict of acquittal on an indictment for an assault would not be evidence against the plaintiff in an action for the same assault: nor would a conviction on the plea of not guilty be evidence for the plaintiff. (*l*) But if a person indicted for an assault plead guilty to the charge, and the record has been considered conclusive against him in an action for damages for the same assault: (1) (*m*) it seems, at least, to be admissible. (2) (*n*)

Conviction, its effect.

A record of conviction is conclusive proof of this fact, that the person charged has been convicted. It is conclusive also of his incompetency as a witness in a court of justice, while the judgment must stand in force against him. (*o*)

It has been stated, indeed, by high authority, that a conviction in a court of criminal jurisdiction is conclusive evidence of the fact, if it afterwards come *collaterally* in controversy in courts of civil jurisdiction. (3) In the case of a father convicted, on an indictment for having two wives, it is said that the conviction would be conclusive evidence in an action of ejectment, where the validity of the second marriage is in

(1) Lamb. Just. B. 2, c. 9, p. 427. cites 9 H. 6, 60, and 11 H. 4, 65.

(2) This point was so ruled by Wood, B. in an action for assault and battery, tried at Leicester Lent Ass. 1808. It was an undefended cause; but Mr. Baron Wood suggested the objection, and after consideration, admitted the record in evidence.

(3) Bull. N. P. 245.

(*l*) See Note 600, p. 851. (*m*) See Note 601, p. 851. (*n*) See Note 602, p. 852. (*o*) See Note 603, p. 852.

dispute.(1) In support of this, the case of Boyle v. Boyle(2) is cited; where a woman, who was libelled in the spiritual court in a cause of jactitation of marriage, applied to the Court of King's Bench for a prohibition, suggesting that the complainant had been convicted of bigamy in marrying her; and the Court of King's Bench granted the prohibition. The best report of this case is in Comberbach, whence it appears that Holloway, C. J. and Allibone, J. granted the prohibition against the opinion of Powell, J., "because," they said, "the libel is for jactitation, and the ecclesiastical court will not allow the plea." Nothing further is to be found in the case, to support such a general position. (*p*)

If the rule is, as Mr. Justice Buller has laid down in the passage above referred to, namely, that a record of conviction may be given in evidence, on the same matter, in a civil suit, it must be understood, at least with this limitation, that the party, who offers such evidence, was not a witness on the prosecution (*q*) To admit the record as evidence on any other condition, would be in effect to allow the party to a suit to give evidence for himself. The record in such a case seems upon every principle inadmissible; and the rule must be the same, whether the conviction was founded solely on his testimony, or whether his testimony was corroborated by other evidence.

Conviction of perjury.

On a trial for perjury, committed in an answer to a bill of injunction, the person who was sued by the defendant in an action then pending, and who in consequence filed the bill, was thought to be a competent witness,(3) on the ground that a conviction, procured by his testimony, could not be used by him for obtaining relief in equity against the defendant's action at law. (4) So a conviction before a magistrate, on the information of the injured party, is not evidence in an action brought by the same party. (5) Ch. B. Gilbert seems indeed to have been of opinion, that where the verdict in the criminal prosecution is supported by other testimony, besides that of the party who

On information.

(1) Bull. N. P. 245. 2 Atk. 412.
(2) 3 Mod. 164. Comberb. 72, S. C.
(3) R. v. Boston, 4 East, 581. Burdon v. Browning, 1 Taunt. 521.
(4) Bartlett v. Pickersgill, 4 East, 577. n. (*b*)
(5) Smith v. Rummems, 1 Campb. 9. Hathaway v. Barrow and others, 1 Campb. 151. Burdon v. Browning, 1 Taunt. 520.

(*p*) See Note 604, p. 852. (*q*) See Note 605, p. 853.

wishes to avail himself of it in the civil suit, there the verdict may be properly received in evidence: for though the verdict, he says, "may be diminished in point of authority, by showing that it was partly founded on the oath of the party interested in the action, yet the jury ought to respect it no further than as they presume it was given and supported by other witnesses not concerned in the cause." (1) It may still, however, be objected, that the fact might have found credit from the party's oath; and since this evidence is so intermixed, that it cannot appear on what the jury relied, the verdict ought not to be admitted at all as evidence.(*r*)

Acquittal, its effect.

Though a conviction, says Mr. Justice Buller, in a court of criminal jurisdiction, is conclusive evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; yet an acquittal, which does not, like a conviction, ascertain facts, is no proof of the reverse. (2) (*s*) It is, however, conclusive, that the party has been tried for the offence, and was not proved to be guilty.(*t*)

(1) Gilb. Ev. 26.

(2) Bull. N. P. 245. Gilb. Ev. 32. A verdict of not guilty, on an indictment against a parish for not repairing a road, is said not to be evidence for the parish on a second indictment, R. v. St. Pancras, Peake, N. P. C. 219 As to acquittals in the Exchequer, see infra, c. 3, s. 3, ad fin.

CHAP. III.

Of the Judgments of Courts of Exclusive Jurisdiction.

General rule.

The great principle on this subject is, that a judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose:(*u*) but that the judgment either of a court of concurrent or exclusive jurisdiction is not evidence of any matter, which came collaterally in question though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.(1)

(1) Judgment of Ch. J. De Grey Tr. 261, fol ed. 20 Howell's St. Tr. in Duchess of Kingston's case, 11 St. 538, S. C.

(*r*) See Note 606, p. 853. (*s*) See Note 607, p. 853. (*t*) See Note 608, p. 853. (*u*) See Note 609, p. 853.

But, although such sentences are conclusive, and cannot be impeached from within, like all other acts of the highest judicial authority, they are impeachable from without. (1) Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it vitiates all judicial acts, whether ecclesiastical or temporal. (2) (*v*) Fraud.

In treating of this subject, it is proposed to consider, First, Sentences of Ecclesiastical Courts: Secondly, Sentences of Courts of Admiralty, and of Foreign Courts: Thirdly, Judgments *in rem* in the Court of Exchequer, and by Commissioners of Excise, and Sentences by Colleges in the Universities.

Sect. I.

Of Sentences in the Ecclesiastical Courts.

Spiritual courts have the sole and exclusive cognisance of questioning or deciding directly the legality of marriage (*w*). And the temporal courts have an inherent power of deciding incidentally, as far as temporal rights are concerned, either upon the fact or legality of a marriage, when they form a part of some more general issue within their cognisance, or are in some way connected with the decision of the proper object of their jurisdiction. But where, in civil causes, the temporal courts find the question of marriage directly determined by the ecclesiastical court, they receive the sentence as conclusive proof of the fact, it being an authority accredited in a judicial proceeding by a court of competent jurisdiction. (3) They receive it upon the same principles, and subject to the same rules, by which they admit the acts of other courts. A sentence of nullity, therefore, and a sentence in affirmance of marriage, have been received as conclusive evidence, on a question of legitimacy arising incidentally upon a claim to a real estate. (4) So, a sentence in a cause of jactitation has been received as evidence against a marriage, upon a title in ejectment, and in personal actions immediately founded on a supposed marriage. (4) In

Sentence on question of marriage.

Sentence of nullity.

Jactitation.

(1) 11 St. Tr. 261.
(2) Fermor's case, 3 Co. Rep. 78. *b.* 11 St. Tr. 261. 20 Howell, 538. Bunting's case, 4 Co. Rep. 29. Kenn's case, 7 Co. Rep. 42. Nedham's case, 8 Rep. 135. *b.* Jones v. Bow, Carth. 225. Da Costa v. Villa Real, 2 Str. 960.
(3) Judgment of De Gray, Ch. J. 11 St. Tr. 261. 20 Howell, 538.
(4) 11 St. Tr. 261. 20 Howell, 538.

(*v*) See Note 610, p. 854. (*w*) See Note 611, p. 856.

all these cases, said C. J. De Grey, the parties to the suit, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it, or claimed under those who were parties, and who had acquiesced.

Between what parties.

The sentences of the spiritual courts are, in general, not evidence, except against the parties to the suit, in which the judgment was given, or against those claiming under them. To make them conclusive against strangers, would be giving them an effect beyond what a judgment in the courts of common law is allowed to have. In a few particular instances, indeed, namely, where issue is joined on the record in certain real writs, on the legality of marriage or its immediate consequence, on general bastardy, or on the fact of profession, or deprivation, in those cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned and entered on record in the temporal courts, is a perpetual and conclusive evidence against all the world on that point; which exceptionable extent was the occasion of a statute in the reign of Henry the Sixth, requiring certain public proclamations to be made, for persons interested to come in and be parties to the proceeding. (1) (*x*)

Certificate of ordinary.

Sentence in cause of jactitation.

A sentence in the cause of jactitation is evidence against a marriage, and has been received as such, upon a title in ejectment, and in personal actions immediately founded upon a supposed marriage; (2) but it will not, like a sentence of nullity, be conclusive evidence. They are sentences of a very different nature and operation. A cause of jactitation is ranked as a cause of defamation only, and not as a matrimonial cause, unless when the defendant pleads a marriage: and, whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, still the sentence has only a negative and qualified effect, namely, that the party has failed in his proof, and that the libellant is free from all matrimonial contract "as far as yet appears," leaving it open to new proofs of the same marriage in the same cause,

(1) Part of the judgment of De Grey, C. J. 11 St. Tr. 261. 20 Howell, 538.

(2) 11 St. Tr. 261. 20 Howell, 538.

(*x*) See Note 612, p. 857.

or to any other proofs of that or any other marriage in another cause. And if such sentence is no plea to a new suit in the ecclesiastical court, and is not conclusive there, in cannot conclude another court, which receives the sentence, from going into new proofs to make out that or any other marriage. (1) Admitting the sentence in its full extent and import, it only proves, that it did not yet appear that the parties were married, and not, that they were not married at all; and, by the rule laid down by Ld. Ch. J. Holt, (2) such sentence cannot be proof of any thing to be inferred by argument from it; and, therefore, it is not to be inferred that there was no marriage at *any* time or place, because the court had not then sufficient evidence to prove a marriage at a *particular* time and place. In the Duchess of Kingston's case, therefore, on a charge of polygamy, where a sentence in a spiritual court, in a cause of jactitation of marriage, was offered as conclusive evidence, to disprove the second marriage, the Judges held, that this sentence (even admitting it to be evidence on a criminal prosecution) could not be conclusive, but that the sentence and the judgment of the Lords might well stand together, and both propositions be true. The sentence would only prove, that it did not then appear that the parties were married; but, because the court had not then sufficient proof of the marriage specified, it could not be inferred, that there was no marriage between them at any other time or place.

Its effect.

The ecclesiastical courts have also exclusive authority in deciding on the validity of wills of things personal, (*y*) and in granting administration. (3) And their sentences, pronounced in the exercise of this sole and exclusive jurisdiction, are so binding on the temporal courts, as to be conclusive evidence of the right directly determined; but it will not be evidence of any collateral matter, which may possibly be collected or inferred from the sentence by argument. (4) (*z*) Therefore, letters of administration, which have been granted to a person as adminis-

Probates, and letters of administration.

General rule.

(1) 11 St Tr. 261. 20 Howell, 538.
(2) Blackham's case, 1 Salk. 290.
(3) Noel v. Wells, 1 Lev. 235. 1 Ld. Raym. 262. 3 T. R. 130.
(4) Blackham's case, 1 Salk. 290. Thompson v. Donaldson, 3 Esp. N. P. C. 63.

(*y*) See Note 613, p. 857. (*z*) See Note 614, p. 857.

trator of the effects of A. B. deceased, are not legitimate proof of A. B.'s death. (1) (*a*)

Proof of will of personalty.

A probate, unrepealed, is conclusive evidence, in civil cases, of the validity of such will; (*b*) and, therefore, payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null and void. (2) (*c*) A probate is the only legitimate evidence of personal property being vested in an executor, or of the appointment of executor; (*d*) the original will is not admissible for that purpose. (3) (*e*) But the probate of a will, devising real property, is not evidence of the contents of a will, as to such property; (4) not, even when the original will is lost, (5) (except, indeed, as a mere copy;) the spiritual court having no power to authenticate such a devise, as far as it relates to land. (*f*)

Of executor's title.

Act of devise of freehold.

Forgery of probate.

The adverse party may show, that the probate is forged, because such evidence supposes that the spiritual court has given no judgment; or if the probate was granted by an inferior court, the adverse party may show that the testator left *bona notabilia*, for then the court had not jurisdiction. (6) (*g*) But evidence will not be admitted to prove that another person was appointed executor, or that the testator was insane: (7) that would be to falsify the proceedings of the ordinary, in cases where he is exclusive judge. (*h*)

Sentence not conclusive in criminal cases.

It appears, then, that the sentence of an ecclesiastical court, directly upon a point within its peculiar jurisdiction, is conclusive on the same matter, coming incidentally into question in a civil case in another court. But, although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration; (8) first, because the parties are not the same, for the king (in

(1) Thompson v. Donaldson, 3 Esp. N. P. C. 63.
(2) Allen v. Dundas, 3 T. R. 125.
(3) Coe v. Westernham, 2 Selw. N. P. 730.
(4) Bull. N. P. 245.
(5) Doe d. Ash v. Calvert, 2 Campb. 389. Hoe v. Nathorp, 1 Ld. Raym. 154. St Leger v. Adams, ib. 751. Dike v. Polhill, ib. 744.
(6) 1 Sid. 359. Bull. N. P. 247. 5 Rep. 30. 1 Lev. 236.
(7) 1 Lev. 236.
(8) 11 St. Tr. 261. 20 Howell's St. Tr. 538.

(*a*) See Note 615, p. 858. (*b*) See Note 616, page 858. (*c*) See Note 617, p. 859. (*d*) See Note 618, p. 859. (*e*) See Note 619, p. 860. (*f*) See Note 620, p. 861. (*g*) See Note 621, p. 870. (*h*) See Note 622, p. 875.

whom the trust of prosecuting public offences is vested, a trust executed by his immediate orders, or in his name by some prosecutor,) is not a party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, examine witnesses, or in any manner intervene or appeal: secondly, such a doctrine would tend to give the spiritual courts, which are not permitted to exercise any judicial cognisance in matters of crime, and immediate influence in trials for offences, and to draw the decision from the course of common law, to which it solely and peculiarly belongs. (1) The case of the King v. Vincent, (2) therefore, (where the probate of a will is said to have been admitted, as conclusive evidence of its validity, on an indictment for the forgery of the same will,) has been frequently much questioned, and at length expressly overruled. (3)

Indictment for forgery.

For the same reason, a sentence in a spiritual court, on the question of marriage, will not preclude enquiry, on a criminal charge of polygamy; unless it is made to have such an effect by an express provision of the legislature. Now, by the statute of 1 J. 1, c. 11, which makes polygamy a felonious offence, and for the trial of this offence necessarily gives to the temporal courts a cognisance of the lawfulness of marriage, it is provided, that the act "shall not extend to any person divorced by a sentence in the ecclesiastical court, nor to any persons where the former marriage has been by the ecclesiastical court declared null and void." There are two cases, then, put by the statute, in which the sentence of the ecclesiastical court will protect against the criminal enquiry, namely, the case of a sentence of divorce, and the case of a sentence of nullity of marriage. (4) But the statute makes no exception in favour of a sentence in a cause of jactitation: and as such a sentence is not conclusive even in the court where it was delivered, and declares not directly, but only collaterally, the invalidity of marriage, it has been adjudged not to be a bar to a criminal prosecution. (5)

Indictment for bigamy.

Sentence when conclusive.

(1) 11 St. Tr. 261. 20 Howell's St. Tr. 538.
(2) 1 Str. 481.
(3) R. v. Gibson, R. v. Buttery and M'Namara, S. P. Russ. & Ry. Cr. C. R. 342, 343, n.
(4) 1 East, P. C. 467.
(5) Duchess of Kingston's case, 11 St. Tr. 260.

Sentence impeachable for fraud.

It has been before mentioned, that judgments and sentences of courts of justice, or any other judicial act, may be impeached by evidence of fraud or collusion. And such evidence was adjudged to be admissible, on the part of the prosecution, in the case of the Duchess of Kingston, who was tried for polygamy. A distinction, in this respect, has been made between the case of a stranger, (who cannot come in and reverse the judgment, and therefore of necessity he must be permitted to aver, that it was fraudulent,) and the case of a party to the proceedings; the party himself cannot give evidence of fraud, but must apply to the Court, which pronounced the judgment, to vacate it. Thus, in the case of Prudham v. Phillips, (1) where the defendant proved her marriage with one M., in answer to which a sentence of an ecclesiastical court was produced, (to which sentence she was a party,) showing that she was at the time married to another person, Chief Justice Willes, after much debate, refused to allow the defendant to prove, that the sentence had been obtained by fraud. (*i*)

Between what parties.

Sect. II.

Of Sentences in Courts of Admiralty and Foreign Courts.

Sentence in questions of prize.

The Judge of the Admiralty has the sole and exclusive cognisance in questions of prize or not prize at sea. (2) The true reason of this rule is, that prizes are acquisitions *jure belli*, and the *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country. A sentence, therefore, in the prize court, deciding the question of prize, is conclusive, in all it professes to decide, on the same point incidentally arising in courts of common law. "It has been clearly settled," said the Master of the Rolls in the case of Kindersley against Chase, (3) "from the time of Lord Hale down to the present period, that a sentence of condemnation in a court of admiralty, when it proceeds on the ground of enemy's property, is conclusive, that the property belongs to enemies, and not only for the immediate purpose of such a sentence, but

(1) Ambler, 763, cited by the Ld. Ch. from a MS. note of Serjt Parker.
(2) Thompson v. Smith, 1 Sid. 320. Brown v. Franklyn, Carth. 476. Le Caux v. Eden, 2 Doug. 600. Lindo v. Rodney, n. 1. (ib.)
(3) Cockpit, July, 1801, Park Ins. 490.

(*i*) See Note 623, p. 877.

is binding in all courts and against all persons. The sentence of a court of admiralty, proceeding *in rem*, must bind all parties, must bind all the world." (*j*)

Sentence of foreign court of admiralty.

The sentence of a foreign court of admiralty also, which is acknowledged by the law of nations, and of competent jurisdiction, deciding the question of property, is conclusive, if the same question arise in this country.(1)* And though in the case of Hughes v. Cornelius, the leading case on this subject, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of insurance, where the non-compliance with a warranty of neutrality is in dispute, yet, from that period down to the present, the doctrine, there laid down, has been considered as applicable to questions of warranty in actions on policies, as to questions of property in actions of trover.(2)(*k*) And it may now be assumed as the settled doctrine of courts of English law, that all sentences of foreign courts, of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of insurance, on every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially.(3) "It is now too late," said Mr. Justice Lawrence,"(4) "to examine the practice of admitting these sentences to the extent to which they have been received, supposing that practice might at first have appeared doubtful. On the authority of those decisions men have acted for a long series of years, and entered into contracts of assurance in this country, with a knowledge of such decisions, and in expectation that the questions, arising out of such contracts, to which the decisions are applicable, will be ruled by them."

General rule.

(1) Hughes v. Cornelius, 2 Show. Rep. 232. Sir T. Ray, 473, S. C. Bernardi v. Motteux, 2 Doug. Rep 575.

(2) By Chambre, J., Lothian v. Henderson, 3 Bos. & Pull. 513.

(3) Bolton v. Gladstone, 5 East, 160. Christie v. Secretan, 8 T. R. 196. Kindersley v Chase, Park, Ins. 486.

(4) Lothian v. Henderson, 3 Bos. & Pull. 524. Baring v. Clagel, 3 Bos. & Pull. 214. See 1 Campb. 432.

* This principle, which is established in our courts of justice, prevails also in those of the United States of America. See 4th vol. of Cranch's Reports of Cases adjudged by the Supreme Court of the United States, pp. 267, 271, 512, 513.

(*j*) See Note 624, p. 880. (*l*) See Note 625, p 881.

Conclusive of what.

Such a sentence of condemnation will be binding on the rights of third persons, as well as on the parties to the original suit; it is conclusive between the assured and the underwriter, with respect to every fact which it professes to decide.(*l*) Thus, when it proceeds on the ground of enemy's property, it is conclusive, that the property belongs to enemies, not only for the immediate purpose of such a sentence, but it is binding on all courts and against all persons.(1) And the sentence is binding, whether it proceed to condemn the ship expressly as being enemy's property, or whether such a ground of decision can only be collected from other parts of the proceedings; and this, although it appear on the face of the sentence, that the prize-court arrived at the conclusion through the medium of rules of evidence and rules of presumption, established only by the particular ordinances of their own country, and not admissible on general principles. (2)

Effect of sentence.

The sentence is conclusive evidence of the points, upon which it professes to decide. (3)(*m*) Thus, for example, if it proceeded upon the ground of the property not being neutral, it is conclusive against the insured, that he has not complied with his warranty. (4) If no special ground is stated, and the ship is condemned generally as lawful prize, it is to be presumed from the condemnation, as no other cause appears, that the sentence proceeded on the ground of the property belonging to an enemy; and the sentence, in such a case, has been held to be conclusive evidence that the property was not neutral. (5)(*n*) In the case of Bernardi v. Motteux, (6) where there was some ambiguity in the sentence, so that the precise ground of the determination could not be collected, the Court of King's Bench considered themselves at liberty to examine, whether the ground on which the sentence proceeded, but which was not stated, actually falsified the warranty contained in the policy. Hence

(1) Kindersley v. Chase, Park, Ins. 490. All the cases on this subject are there collected.

(2) Bolton v. Gladstone; 5 East, 155. 2 Taunt. 85. Baring v. Roy, Ex. Ass. Comp. 5 East, 99.

(3) Christie v. Secretan, 8 T. R. 196. Fisher v. Ogle, 1 Campb. 418. Everth v. Hannom, 2 Marshall, 72. Marshall v. Parker, 2 Campb. 70.

(4) Barzillay v. Lewis, Park, Ins. 469. Baring v. Clagett, 3 Bos. & Pull. 201.

(5) Salaucci v. Woodmas, Park, Ins. 471. 8 T. R. 444.

(6) 2 Dougl. 574. 5 Bos. & Pull. 215.

(*l*) See Note 626, p. 881. (*m*) See Note 627, p. 883. (*n*) See Note 628, p. 883.

it follows, that it does not lie on the party, who produces the sentence, to show that it has proceeded on the ground of enemy's property ; but it is incumbent on the other party, who objects to the sentence, to show that it proceeded on some other ground.(1)(*o*)

When not conclusive.

Where the sentence professes to be made on particular grounds, which are set forth in the sentence, but which appear not to warrant the condemnation, the sentence will not be conclusive as to such facts.(2) (*p*) Of if the sentence has not decided the question of property, nor declared whether it be neutral, but condemned the property as prize, solely on the ground, that the ship had violated an *ex parte* ordinance, to which the neutral country had not assented, or on the ground of a foreign ordinance against the law of nations, such a sentence, though conclusive of the question of prize or no prize, would not be conclusive of the fact, whether or not the ship were neutral. (3) (*q*)

Not admissible, when.

Lastly, sentences of condemnation in foreign courts of prize are admissible, only where such courts are constituted according to the law of nations, and exercise their functions either in the belligerent country, or in the country of a co-belligerent, or ally in the war.(4) It has, therefore, been determined, that a sentence pronounced by the authority of the capturing power, within the dominions of a neutral country, to which the prize may have been taken, is illegal, (5) and consequently would not be admissible evidence to falsify the warranty of neutrality. (*r*)

Sentence of other foreign courts.

The sentence of any other foreign court of competent jurisdiction, directly deciding a question, which was properly cognizable by the law of the country, seems to be conclusive here, if the same question arise incidentally between the same parties in this country. Thus, the sentence of a foreign court of competent jurisdiction, directly establishing a marriage in

(1) Kindersley v. Chase, Park, Ins. 490.
(2) Calvert v. Bovil, 7 T. R. 523, 8 T. R. 444.
(3) Pollard v. Bell, 8 T. R. 444. Bird v. Appleton, 8 T. R. 562 Baring v. Clagett, 3 Bos. & Pull. 215. Bolton v. Gladstone, 2 Taunt. 85, 95. See 2 Campb. 154.
(4) Oddy v. Bovil, 2 East, 473.
(5) Havelock v. Rockwood, 8 T. R. 268. Caso of the Flad Oven, 8 T. R. 270, n. (*a*); 1 Rob. Adm. Rep. 135. Donaldson v. Thompson, 1 Campb. 429.

(*o*) See Note 629, p. 884. (*p*) See Note 630, p. 885. (*q*) See Note 631, p. 885
(*r*) See Note 632, p. 886.

In civil cases.

that country would be conclusive in any of our courts on the validity of the marriage. (1) (*s*) So, where a party having accepted a bill of exchange drawn upon him at Leghorn, instituted a suit there, in which suit his acceptance was vacated, and, upon his return to this country, being sued again on his acceptance, applied to the Court of Chancery for an injunction and relief against the second action, Lord Chancellor King decided, that the cause was to be determined by the law of the country where the bill was negotiated; and, as the acceptance had been there declared void by a competent jurisdiction, he thought the sentence must here also

In criminal.

be conclusive. (2) So, on a criminal charge, (as, for murder committed in a foreign country,) an acquittal in that country might be pleaded here in bar to an indictment for the same offence; (3) (*t*) because, says Mr. Justice Buller, a final determination in a court of competent jurisdiction is conclusive in all courts of concurrent jurisdiction. (4) (*u*) From the two last cases the following principle seems to be properly deducible, namely, that a party, who has been once discharged from a criminal charge, or from a legal demand, by the sentence of a foreign court of competent jurisdiction may protect himself by that sentence against any fresh suit or prosecution, instituted here for the same cause.

Action on foreign judgment.

If an action is brought in this country, as an action of debt or assumpsit, directly upon a foreign judgment, the sentence has been considered *prima facie* evidence of the debt, but not conclusive. In the case of Sinclair v. Fraser, (5) which was an action in the Court of Session in Scotland, on a judgment of the supreme court in Jamaica, the Court of Session refused to give any effect to the foreign judgment, and held, that the plaintiff was bound to prove the ground, the nature, and the extent of his demand, on which the judgment in Jamaica had

Judgment prim. fac. evidence.

been obtained. But the House of Lords, on an appeal, reversed the decision of the Court of Session, pronouncing the following special order of reversal: "It is declared, that the judgment of

(1) By Ld. Hardwicke, in Roach v. Garvan, 1 Ves. 159.

(2) Burrows v. Jemino, 2 Str. 733. S. C. 1 Dickens, 48. See Plumoner v. Woodburne, 4 Barn. & Cress. 625.

(3) Hutchinson's case, cited 1 Show. Rep. 6; also in 2 Str. 733.

(4) Bull. N. P. 245. Roche's case, 1 Leach Cr. C. 160.

(5) 1 Doug. 5, in note. 20 Howell's St. Tr. 468.

(*s*) See Note 633, p. 888. (*t*) See Note 634, p. 890. (*u*) See Note 635, p. 890.

the supreme court of Jamaica ought to be received as *evidence, prima facie, of the debt*, and that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly or unduly obtained."

In the case of Walker v. Witter, (1) where the question was, whether the plaintiff in an action or a judgment, obtained by him in the supreme court of Jamaica, ought in pleading to show the ground of the judgment, the Court of King's Bench determined that this was not necessary; that foreign judgments are a ground of action in this country, but that they are examinable, when made the subject of a suit.

Lord Kenyon, indeed, in the case of Galbraith v. Neville, (2) which was an action of debt on a judgment in the supreme court of Jamaica, said, he entertained serious doubts concerning the doctrine laid down in the case of Walker v. Witter, (3) that foreign judgments are not binding upon the parties here; and after referring to a case, which might seem to point against his opinion, he added, "that is not an authority for saying, that we can revise the judgments of the lowest courts in foreign countries, where they have competent jurisdiction." However, Mr. Justice Buller in the same case, said, "The doctrine which was laid down in the case of Sinclair v. Fraser has always been considered the true line ever since, namely, that the foreign judgment shall be *prima facie* evidence of the debt, and conclusive, till it be impeached by the other party."—"As to actions of this sort," he continued, "see how far the Court would go, if what was said in the case of Walker v. Witter were departed from. It was there held, that the foreign judgment was only taken to be *prima facie* evidence, that is, we will allow the same force to a foreign judgment, that we do to those of our own courts not of record: (4) but if the matter were carried farther, we should give them more credit; we should give them equal force with those of courts of record here. Now a foreign judgment has never been considered as a record: it cannot be declared on

(1) 1 Doug. 1. In the case of Herbert v. Cook, also Willes, 37, in note, Lord Mansfield declared, that a foreign judgment is not *conclusive* evidence of a debt.

(2) 1 Doug. Rep. 5, n. (2); and 5 East, 475, n. (*b*) S. C.

(3) 1 Doug. 5, note ‡.

(4) Acc. Ld. Mansfield in Herbert v. Cook, Willes, Rep. 37, n. (*a*.)

as such, and a plea of *nul tiel* record in such a case is a mere nullity. How then can it have the same obligatory force? In short, the result is this; that it is *prima facie* evidence of the justice of the demand in an action of assumpsit, having no more credit than is given to every species of written agreements, namely, that it shall be considered as good till it is impeached."

Judgment not conclusive.

In the case of Philips v. Hunter, (1) Eyre, C. J., said, "It is in one way only, that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it not as obligatory to the extent, to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as a consideration *prima facie* sufficient to raise a promise. We examine it, as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by the law."

For certain purposes, indeed, the judgments of foreign courts, even courts of municipal law, will be conclusive, according to their subject-matter; (2) but where such judgments are put in suit, and made the subject of an action in this country, the better opinion seems to be, that they are only *prima facie* evidence of a debt, and have the force of a simple contract between the parties. Even in the case of judgments of foreign courts of admiralty, which are constituted on the universal law of nations, judges of great authority have doubted, whether it is not from an over-strained amity, that they have been allowed to be conclusive. (3) And, perhaps, on considering the constitution and the conduct of some municipal courts in some foreign countries, it may be deemed amply sufficient, in the way of respect and courtesy, to give their judgments the credit

(1) 2 H. Black. 410, in error.

(2) See Burrows v. Jemino, ante, p. 350. Tarleton v. Tarleton, infra, p. 354.

(3) See particularly Fisher v. Ogle, 2 Park, Ins. 552.

of *prima facie* evidence, and not to allow them more. It is not unimportant, also, to observe, that this is precisely the degree of credit, which the judgments of our courts of justice receive in some foreign courts; they are treated as *prima facie* evidence of a debt, but not conclusive. (1) (*v*)

Foreign judgment, when void.

When it is said, that a foreign judgment is evidence of a debt, the rule must obviously be understood with this limitation, that nothing appears in the record of the proceedings, on which the judgment is founded, contrary to reason and justice. If the judgment, for example, should have passed against a defendant, who does not appear to have been served with process, or to have had any opportunity of defending the action, such a judgment would not be enforced by courts of justice in this country. This point occurred in the case of Buchanan v. Rucker, (2) where it appeared from the proceedings, that the summons had been served by nailing up a copy of the declaration on the door of the court-house; and it was adjudged, that although such might be the practice abroad, it was a practice inconsistent with all principles of justice, and that the judgment therefore could not be made the ground of an action of assumpsit. It will be necessary, therefore, to prove that the party was duly summoned, or, if he is described in the proceedings as an absentee, that he had absented himself from the country. (3) (*w*) With respect to the proof of his absence, that fact might perhaps be inferred from a return of *non est inventus* to the process issued against him, if it be proved that he had been in the country. (4) (*x*)

Effect of Foreign judgment as evidence.

Although the foreign judgment is only *prima facie* evidence of a debt, for which the suit abroad was instituted, yet for many purposes it will be conclusive between the parties, according to the nature of the subject matter, and the purposes to which the evidence is applied. Thus, where a covenant had been made by the defendant, to indemnify the plaintiff from all debts due from

(1) Such is the law of the United States of America. The decisions upon this point, cited in an American edition of an English Treatise on Evidence, are the following; Buttrick v. Allen, 8 Mass. Rep. 273. 9 Mass. Rep. 464. 3 Johns Rep. 169.

(2) 1 Campb. 63 9 East, 192, S. C.

(3) Buchanan v. Rucker, 9 East, 192. Cavan v. Stewart, 1 Stark. N. P. C. 525

(4) By Lord Ellenborough, Cavan v. Stewart, 1 Stark. N. P. C. 525.

(*v*) See Note 891, p. 891. (*w*) See Note 903, p. 903. (*x*) See Note 638, p. 915.

a late partnership, subsisting between the plaintiff, the defendant, and a third person, and from all suits on account of non-payment, proof on the part of the plaintiff, that proceedings had been instituted in a foreign court against the late partners, for the recovery of a partnership debt, and that a decree passed against them for want of an answer (in consequence of which a sequestration issued against the estate of the plaintiff, and he was obliged to pay the debt,) is conclusive evidence, in an action on the covenant against the defendant, who was a party to the foreign suit, and who, having notice, ought to have appeared and made his defence; and the defendant is not at liberty to show, that the proceedings are erroneous. (1)

Sect. III.

Of Judgments in rem in the Exchequer, by Commissioners of Excise and by Colleges in the Universities.

Judgment of condemnation in the Exchequer.

A JUDGMENT of condemnation in the Court of Exchequer, where proceedings *in rem* have been instituted, is conclusive evidence in any other court, as to all the world, that the goods were liable to be seized. (2) The jurisdiction of the Court of Exchequer in this case is not only competent, but sole and exclusive; and though no formal or express notice is given to the owner of the goods in person, yet he has sufficient notice to try the point of forfeiture, by the seizure of his property, by the proclamations according to the course of the court, and by the writ of appraisement.

A record of condemnation, for adulterating spirits, is evidence between other parties; but a record of conviction for penalties, which is a proceeding *in personam*, not *in rem*, is of a different nature, and subject to the same rules as other judicial proceedings. In an action, therefore, for the price of spirits, where the defence was, that the spirits had been adulterated, such record of conviction has been held not to be admissible as proof of the adulteration. (3) The Court of Exchequer decided, in the

(1) Tarleton v. Tarleton, 4 Maule & Selw. 21 Molony v Giblons, 2 Campb. 502.

(2) Scott v. Shearman, 2 Black. Rep. 979. By Ld. Kenyon, C. J., in Geyer v. Aguillar, 7 T. R. 696. Bull. N. P. 244 See also the cases cited in 5 Price, 502

(3) Hart v. M'Namara, 4 Price, 154, in note, by Gibbs, Ch J.

case of the Attorney-general v. King, (1) that a record of condemnation of goods, proceeding from one act of parliament, is not evidence with respect to the commission of an offence charged under another act. And Mr. Baron Wood held, (2) in the same case, that the record, if admissible at all, could not be admitted as proof of any immaterial allegation, which might be contained in the record. (3)

Condemnation by commissioners of excise.

It appears also to have been decided in several cases, that a judgment of condemnation by commissioners of excise, in a matter exclusively within their jurisdiction, is conclusive, on the right of seizure coming into question in any other court; (4) although, in one instance, the Court of Common Pleas were of opinion that the judgment would not have such a binding effect, on the ground that the commissioners of excise were not a *court of record*. (5) But, it is to be remembered, the general principle established in the Duchess of Kington's case is not confined to the judgments of *courts of record*, some of which are of a very inferior description, but extends equally to every court of competent or exclusive jurisdiction; and the examples cited by C. J. De Grey, in illustration of this principle, are all drawn from the proceedings in ecclesiastical courts, none of which are classed among courts of record.

Acquittal.

An acquittal in the Exchequer was considered by Lord Kenyon, in the case of Cooke v. Sholl, (6) to be conclusive evidence of the illegality of the seizure. That was an action of trover for several pipes of wine seized by the defendant for want of a permit. At the trial of the cause, the plaintiff gave in evidence a record of acquittal in the Court of Exchequer. The defendant then insisted, that, under the circumstances of this case, the permit had expired before the seizure was made; and Mr. Justice Heath, who tried the cause, was of that opinion; but on its being suggested, that there had been a different de-

(1) 5 Price, 196.
(2) 5 Price, 211.
(3) See ante, c. 2, s. 1.
(4) Terry v. Huntington, Hard. 490. Fuller v. Fotch, Carth. 346. Roberts v. Fortune, before Lee, Ch. J., 1462. 4 Harg. Law Tracts, 468, n.
(5) Henshaw v. Pleasance, 2 Black. Rep. 1174.
(6) 5 T. R. 205, and see a case in 12 Vin. Ab. (A. b. 32, pl. 1, before Price B. acc.)

termination in the Court of Exchequer, he reserved the point for the opinion of the Court of King's Bench, with liberty to enter a verdict for the defendant, if it should be adjudged for him. When the case came before the Court, Lord Kenyon thought the record of acquittal precluded all reasoning on the construction of the p rmit; but as the question respecting the judgment of acquittal was not upon the record, and the only question was on the construction of the permit, a verdict was entered for the defendant. This case, therefore, has not determined, that an acquittal in the Exchequer would be conclusive evidence of the illegality of a seizure, although certainly that appears to have been the opinion of Lord Kenyon. It may be observed, that an acquittal does not, like a conviction, ascertain any precise fact. The sentence might have proceeded on the ground, that sufficient evidence was not produced, on the part of the crown, to warrant the seizure; and though the sentence may be conclusive as against the crown, it seems reasonable, that it should not have such a conclusive operation, in an action for seizing the property, against a third person, who was not a party with the crown in the original proceedings, and had no notice or opportunity for supporting the condemnation.

Sentence of deprivation by college.

The principle which has been before laid down as applicable to the sentences of courts of justice, seems to apply equally to the judicial proceedings of other tribunals, which are invested with an exclusive or peculiar jurisdiction. A sentence of deprivation or expulsion of one of the members of a college, by the master and fellows, or by the visitor on an appeal, upon a subject within their jurisdiction, is conclusive in courts of law; and the justice of their decision cannot be questioned even in the King's Bench, though it belongs to that court to control them, if they exceed the bounds of their jurisdiction. On this principle, a mandamus, to restore the fellow of a college, has been frequently refused. (1) In the case of Philips v. Bury, it was decided, on an appeal to the House of Lords, that a sentence of deprivation, by the visitor of a college, acting within the limits of his visatorial jurisdiction, was conclusive evidence in

(1) Dr. Widrington's case, 1 Lev. 23. Dr. Patrick's case, 1 Lev. 65. Case of New College, 2 Lev. 14.

an action of ejectment for one of the college estates; and the judgment of the Court of King's Bench, which had been given on the opinions of three Judges against the opinion of Lord Holt, was reversed. (1) And in the last case on this subject, which was a prosecution for an assault in turning out of a college one who had been expelled, the Court of King's Bench determined, that evidence, impeaching the sentence of expulsion, had been properly rejected at the trial. (2)

Sentence by competent court.

It is a general rule, with respect to special and limited jurisdictions, that where a person acts as judge, (that is, where he has over the subject-matter a general jurisdiction, which he has not exceeded) he will not be liable to have his judgment examined in an action brought against him. (3) Thus, if an ecclesiastical judge proceed to excommunicate in a cause, in which he has jurisdiction over the subject-matter, he will not be liable to an action, although he proceed to excommunicate erroneously; but if he excommunicates in a matter, in which he has no jurisdiction, he will be liable to an action. (4) And where a statute provides, that the judgment of commissioners, appointed by the act, shall be final, their decision is conclusive, and cannot be questioned in any collateral proceeding. It has therefore been held, that a certificate from commissioners for settling the debts of the army, stating that so much was due from the defendant (an army-agent) to the plaintiff (an officer,) was conclusive in an action brought to recover the money; and that no evidence could be received to show, that the commissioners had formed a wrong judgment. (5)

(1) Philips v. Bury, Skin. 447. 1 Ld. Raym. 5, S. C. 2 T. R. 346, S. C.

(2) R. v. Grundon, Cowp. 315.

(3) Marshalsea case, 10 Rep. 76. Dr. Groenvelt v. Dr. Burwell, 1 Ld. Raym. 454, 467; 1 Salk. 396, S. C. Miller v. Seare, 2 Black. Rep. 1145. Moses v. Macferlan, 2 Burr. 1006.

(4) Ackerley v. Parkinson and Mawdesley, 3 Maule & Selw. 411.

(5) Moody v. Thurston, 1 Str. 481, ruled by Pratt, C. J.; and a new trial afterwards refused by the whole Court. See also Lane v. Hegberg, Bull. N. P. 19; Earl of Radnor v. Reeve, 2 Bos. & Pull. 391. Brown v. Bullen, 1 Doug. 407.

CHAP. IV.

Of certain other Judicial Proceedings.

We proceed now to treat of the admissibility of certain other judicial proceedings; and in the present chapter, it is proposed to consider, first, the admissibility of proceedings in Chancery; secondly, the admissibility of depositions on interrogatories, or depositions taken before justices of the peace and coroners, of inquisitions taken by coroners, of certain other inquisitions, of depositions and judgments in inferior courts, of awards, and of certificates.

Sect. I.

Of Proceedings in Chancery.

Decree.

A decree in the Court of Chancery may be given in evidence on the same footing, and under the same limitations, as the verdict or judgment of a court of common law. (1) (*y*)

Bill.

The common opinion used to be, that a bill in Chancery, which had been followed up by other proceedings, was admissible in evidence against the complainant, as an admission of facts. (1) "The allegations in the bill, it was said, must be supposed to be true: nor is it to be presumed, that the bill was preferred by a counsel or solicitor, without the privity of the party himself." (2) However, it is notorious, that many of the facts stated in the bill are the mere suggestions of counsel, made for the purpose of extorting money from the defendant. The general rule therefore is, that a bill in Chancery will not be evidence, except to show, that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer or the depositions of witnesses: (3) it is not to be admitted as evidence, in courts of law, to prove any facts either alleged or denied in the bill. (4) (*z*)

(1) See ante, c. 2, s. 1.

(2) Snow v. Phillips, 1 Sid. 221. Gilb. Ev. 42. Wollet v. Roberts, 1 Chan. Cas. 64, contra.

(3) Lord Ferrers v. Shirley, Fitzgib. 196. Bull. N. P. 235. Bowerman v. Sybourn, 7 T. R. 3. 1 Wightw. 325.

(4) Banbury peerage case, reported from MS. in 2 Selw. N. P. 685.

(*y*) See Note 639, p. 915. (*z*) See Note 640, p. 923.

Answer.

Lord Kenyon, indeed, is reported to have admitted a bill in Chancery, filed by an ancestor, to be evidence of a pedigree there stated, as a declaration in the family. (1) But it was resolved by the Judges in the Banbury peerage case, on a question put to them by the House of Lords, that a bill in equity, or depositions, cannot be received in evidence in the courts below, on the trial of an action of ejectment, against a party not claiming or deriving in any manner under the plaintiff or defendant in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree. (2) And even if the bill or depositions could be received, some extrinsic proof must be given of the relationship between the complainant and the party whose pedigree is disputed. It would not be sufficient, that the bill purports to have been filed by a relation. In the Banbury peerage case, before mentioned, where C. D.'s legitimacy was in question, the complainant offered in evidence a bill filed in C. D 's name by E. F. his uncle and next friend, stating his legitimacy, but there was no proof that E. F. was his uncle: the Judges, being referred to for their opinion, were unanimous, that extrinsic proof of the relationship was essential, and the bill, which was above 150 years old, was accordingly rejected. (3)

Answer.

Answers in Chancery (*a*) are confessions on oath, and therefore strong evidence against the party who makes them. (*b*) When an answer is read, all the parts must be taken together, connected, and entire. If only a part is read in evidence, the other party is entitled to have the whole read; (4) (*c*) and if, on exceptions being taken, a second answer is put in, the defendant may insist upon having that also read, to explain what he swore in his first answer. (5) (*d*) This is the general rule, when an answer of either party to the suit is given in evidence against him, to prove a point in issue. But if an answer is produced, merely for the purpose of showing the incompetency of a witness, who has in his answer admitted himself interested in the event of the cause,

Whole to be read.

(1) Taylor v. Cole, sitt. after Hil. term, 1799, 7 T R 3, n.

(2) 2 Selw. N. P. 685. See also Berkeley peerage case, supra, p. 243, and Freeman v. Phillipps, supra, p. 246.

(3) See Note (4) ante, p. 358.

(4) By Holt, C. J , Lynch v. Clarke, 3 Salk. 153. Earl of Bath v. Battersea, 5 Mod. 9.

(5) R. v. Carr, 1 Sid. 418. Bull. N. P. 237.

(*a*) See Note 641, p. 924. (*b*) See Note 642, p. 926. (*c*) See Note 643, p. 926. (*d*) See Note 644, p 928.

Answer.

that part only is to be read which states the ground of interest;(1) for if the witness is incompetent, his evidence ought not to be received in any form; on the other hand, if he is competent, he ought to be examined *viva voce* in open court.

When you read the answer of a party, says Ch. B. Gilbert, the confession must be all taken together: you shall not take only what makes against him, and leave out what makes for him; for the answer is read as the sense of the party. (2) But although the defendant may regularly insist on having the whole of the answer read, that by comparing the several parts with each other, the true meaning and extent of the admissions may be more clearly understood, it will not therefore follow, that all the parts of his statements are equally credible, or that every thing, which he asserts, is to be admitted as strictly proved. If, for example, he states a fact, not from his own knowledge, but on mere report, that would not be evidence in his favour; as, on the other hand, it would not be evidence against him, in case he had acknowledged the report to be different. The objection is, not that he speaks in his own behalf, (for that difficulty is waived by the other party, who offers the answer in evidence,) but that he speaks from hearsay, (*e*) and has not the means of knowledge, which alone can be resorted to. In the case of Roe on demise of Pellatt and others against Ferrars, (3) where the defendant gave in evidence an answer by the lessors of the plaintiff, Mr. Justice Chambre, observing upon the degree of positive proof which the lessors of the plaintiff had drawn from the answer in their own favour, expressed himself thus:—"It is true, that the answer was introduced into the cause by the defendant, on whose behalf some parts of it were read. But in those parts, on which the lessors of the plaintiff relied, they speak only to what 'they have heard as truth.' I think that was not admissible evidence, for it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, (*f*) and that he does not thereby admit as evidence all the facts, which may

Hearsay statement in answer.

(1) Sparin v. Drax, trial at bar, Bull. N. P. 238.
(2) Gilb Ev. 44.
(3) 2 Bos. & Pull. 542, 548. See also the remark of Lord Mansfield, in Bermon v. Woodbridge, 2 Doug. 788.

(*e*) See Note 645, p. 928. (*f*) See Note 646, p. 928.

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happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for discovery. This point," he added, "does indeed appear to have been contested at the trial. Had it been contested, I should have thought the court bound to send the case down for a new trial." (*g*)

Evidence against privy.

An answer to a bill filed in the Court of Exchequer, in a suit instituted for tithe-hay by a vicar against the rector and others (owners of lands in the parish), in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, will be evidence, in an action for tithes by a succeeding rector against owners or occupiers of the same lands, for the tithes of which the former suit was instituted. (1) "This appears to me," said Lord Ellenborough, not to be *res inter alios acta*, but, *inter eosdem acta;* and was not only evidence, but strong evidence, against the defendant, who stood in the same place, by derivation of title and by legal obligation, as the former occupier of the same land; and that former owner, upon his oath, in a suit against him by the vicar, has declared that the tithe is due to the rector, and not to the vicar; and now that same person, *in effect*, (that is, the present owner, who purchased of the former owner the very lands, over which tithes were now claimed,) is deraigning the title of the rector in favour of the vicar." (*h*)

Examined copy of answer.

In the case last cited, the answer was adjudged to be admissible in evidence, although it did not appear that there had been any decree made in the suit; and proof of an examined copy was sufficient proof of the answer. (2) "I know of no case," said Lord Ellenborough, "where, in a mere civil proceeding, it is held necessary to have the actual answer signed by the party, in order to read it against him; the rule only applies where the party is charged criminally, as in perjury, or in an action for a malicious prosecution, which is in the nature of a criminal proceeding."

(1) Lady Dartmouth v. Roberts, 16 East, 334. The suit was abandoned by the vicar, who from that time had acquiesced. See also Travis v. Chaloner, 3 Gwill. 1237. Ashby v. Power, 3 Gwill. 1239. Benson v. Olive, 2 Gwill. 701. Earl of Sussex v. Temple, 1 Ld. Raym. 310.

(2) 16 East, 334.

(*g*) See Note 647, p. 929. (*h*) See Note 648, p. 930.

Answer.

Answer of minor.

The answer of a minor by his guardian is not evidence against him (1); because, in reality, it is the guardian's answer. The guardian is sworn, not the minor, who possibly may know nothing of its contents. And therefore an answer, purporting to be the answer of a minor by his mother and guardian, may be read against the mother in another cause in which she is defendant in her own capacity. (2) (*i*)

Of co-defendant.

The answer of one defendant, generally speaking, is not evidence against a co-defendant (3) (*j*); for if that were allowed, a plaintiff might make one of his friends a defendant for the purpose of procuring an answer in his favor against the co-defendant, who would have no opportunity of cross examination. (*k*) But as an admission by one of two partners, concerning joint contracts during the partnership, is good evidence to charge the other partner in an action against him alone (4): so, in an action by a creditor against some of the partnership firm, the answer of another partner to a bill, filed by other creditors, has been received in evidence against the defendants, not, indeed, to prove the partnership, but, that being established, as an admission against those who are as one person with him in interest. (5)

Of partner.

Of married woman.

It does not appear to have been expressly determined, whether an answer by a married woman can be used as evidence against her in an action after the husband's death. In the case of Wrottesley against Bendish and his wife (6) (where it was argued that the wife was not bound to answer, on the ground that the answer could not be read against her husband, nor against herself, as she is supposed to be under the control of the husband, and not to answer freely), the Lord Chancellor said, "he would not give any opinion, whether the answer may be read against the wife when discovert: but as, in all times heretofore, the wife as well as the husband had been compelled to

(1) Eccleston v. Petty, Carth. 79. 3 P. Wms. 237. Gilb. Ev. 44. Cowling v. Ely, 2 Starkie, N. P. C. 366.

(2) Beasley v. Magrath, 2 Schoale and Lefroy's Rep. 34.

(3) Wych v. Meal, 3 P. Wms. 311. 12. Ves. 261.

(4) Wood and others, Assignees of Hussey and others, v. Braddick, 1 Taunt. Rep. 104.

(5) Grant v. Jackson and others, Peake, N. P. C. 203. See Lucas v. De La Cour, 1 Maule & Selw. 250.; vide supra, p 92.

(6) 3 P. Wms. 237. See Barron v. Grillard, 3 Ves. & Beam. 166.

(*i*) See Note 649, p 931. (*j*) See Note 650, p. 931, (*k*) See Note 651, p. 932.

answer, he would not overthrow what had been the constant practice. (*l*) Depositions.

Depositions in a suit in Chancery, which are the written examinations of witnesses taken by officers of the court, or taken by commissioners specially appointed for the purpose, may be given in evidence in an action at common law, on the same matter, between the same parties, or between any who claim under them, if it can be proved at the time of the trial, that the deponent is dead (1)(*m*); or, that he cannot be found after strict enquiry (2); or, that he has been subpœnaed, and is unable to attend from sickness (3)(*n*); or, if it can be proved, that he has been kept away by the contrivance of the other party (4); or that he is out of the kingdom, or not amenable to the process of the Court. (5) In either of these cases, depositions are admissible in evidence. But if the witness himself is in a state to be produced, his depositions cannot be received. The party who wishes to have the benefit of his testimony, ought, if he is able, to bring him forward, that he may undergo an open examination, in the face of the public, before the jury and the court: a mode of enquiry generally more conducive than any other to the discovery of truth. (*o*) Depositions.

It is the common practice in the Court of Chancery, when an issue or trial at law is directed to make an order, that the depositions of witnesses shall be read in evidence, if it be satisfactorily proved at the time of trial, that they are unable to attend in person. (6) But this order is not made for the purpose of making that admissible in evidence, which is of a nature not strictly admissible in courts of common law, but for the convenience of the parties. For if depositions are offered at the trial without such an order, the whole record, bill, answer, &c. must be proved; but if there is an order for reading the deposi- Order for reading depositions.

(1) Godb. p. 193. pl. 276. and p. 326. pl. 418. Fry v. Wood, 1 Atk. Rep. 445. Coker v. Farewell, 2 P. Wms. 563. Gilb. Ev. 54. Bull. N. P. 239.

(2) Vide supra (1). Benson v. Olive, before Reynolds C. B. 2 Str. 929.

(3) Luttrell v. Reynel and others, 1 Mod. 283. Adm. per Cur. in Kinsman v. Crooke, trial at bar, 2 Ld. Ray. 1166. 1 Atk. 445. Gilb. Ev. 54. Bull. N. P. 234. 1 Ves. & Beam. 22. 340. Jones v. Jones, 1 Cox Cas. 184.

(4) Bull. N. P. 243.

(5) 1 Atk. Rep 445. Lord Altham v. Earl of Anglesey, trial at bar in K. B., Gilb. Eq. Cas. 16. 18. Rep. Temp. Holt, 736, S. C.

(6) Corbet v. Corbet, 1 Ves. & Beam. 340.

(*l*) See Note 652, p. 932. (*m*) See Note 653, p. 933. (*n*) See Note 654, p. 933. (*o*) See Note 655, p. 933.

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tions, the court of law will read them without going through the regular and strict course, which is generally necessary for the purpose of making them evidence. (1)(*p*)

When a witness has been examined on interrogatories, and afterwards becomes interested, the Court of Chancery has allowed his depositions to be read for him, as evidence in his own suit on a bill of revivor.(2) "This," said Lord Hardwicke, "has been allowed on just reason: because his evidence must be taken, as it stood at the time of his examination, which should not be set aside, unless it could be supplied by other evidence." (3) But a different rule has been established in courts of common law. It was resolved in Tilly's case, by the unanimous opinions of the courts of King's Bench and Common Pleas, that a party to an action of ejectment could not give in evidence his own depositions, though he had made them at a time when he was perfectly disinterested.(4)(*q*)

Evidence against whom.

Depositions are not to be admitted in evidence for a party to the suit against one who was not a party, nor claims under either of the parties (5)(*r*); nor can they be used by a stranger against one of the parties. (6)(*s*) An exception has been made in cases, where the question is on the existence of a custom, or on the right to tolls, or where hearsay and reputation would be good evidence (7)(*t*): in such cases, depositions are admissible in evidence, in a suit between other parties, provided they have not been made *post litem motam*. (*u*) But if the question at issue is precisely the same in both suits, the depositions in the former suit cannot be admitted. (8)

On leading questions, &c.

Depositions in a suit, instituted for the purpose of perpetuating testimony, are not objectionable, on the ground that the in-

(1) Palmer v. Lord Aylesbury, 15 Ves. 176.

(2) Goss v. Tracy, 2 Vern. 699. 1 P. Wms. 287. S. C. Haws v. Hand, 2 Atk. 615.

(3) In Glyn v. Bank of England, 2 Ves. 42.

(4) Tilly's case, 1 Salk. 286. See also Holcroft v. Smith, Eq. Cas Ab. 224.; Baker v. Lord Fairfax, 1 Str. 101.; Bull. N. P. 242.

(5) Hob. Rep. 155. 2 Roll. Ab. 679. pl. 8. Cooke v. Fountain, 1 Vern. 413. As to the general principle, see ante, ch. 2. s. 1. and 2 Price, 434.

(6) Rushworth v. Countess of Pembroke and Currier, Hard. 472. Gilb. Ev. 55.

(7) Bull. N. P. 239. Vide supra, p. 243.

(8) Berkeley peerage case, supra, p. 243. Freeman v. Phillips, supra, p. 246.

(*p*) See Note 656, p. 934. (*q*) See Note 657, p. 934. (*r*) See Nore 658, p. 934. (*s*) See Note 659, p. 935. (*t*) See Note 660, p. 935. (*u*) See Note 661, p. 935.

terrogatories, in answer to which they were made, were leading interrogatories, and such as could not regularly be put on the examination of a witness: for the party, against whom the depositions were originally made, had an opportunity of objecting to them, and might have applied to have them expunged, instead of which he allowed publication to pass, and the evidence to be exemplified; the objection, therefore, though it might have been taken with effect in the first instance, is too late, after such an acquiescence by the party. (1) So where interrogatories and cross-interrogatories have been exhibited by the parties to a suit, the answers of the witness cannot be objected to at the trial, as inadmissible, on the ground that he was interested, and ought to have had a release previous to his examination (2); after cross-interrogatories, the objection is too late. (*v*)

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From interested witness.

When a bill has been dismissed, the rule respecting the admissibility of the depositions has been laid down with the following distinction. If the bill was dismissed, because the court considered the matter to be unfit for equity to decree, the depositions may still be given in evidence, provided the subject-matter of the suit was regularly before the court, and within its jurisdiction. (3) (*w*) But if the suit in equity be dismissed for the irregularity of the complainant, it has been said that the depositions in that cause cannot be read in any fresh suit. Thus, where a devisee brings a bill of revivor, on a suit commenced by his devisor, and depositions are taken, and then the cause on the hearing is dismissed, on the ground that a devisee, claiming as a purchaser and not by representation, cannot bring a bill of revivor, the devisee will not be allowed, on exhibiting a new original bill to use the former depositions: for in the first cause, in which the complainant mistook his remedy, there was no complaint regularly before the court, and, consequently, there could not regularly be any depositions. (4)

After bill dismissed.

If the witness after being examined *de bene esse* should die, before the defendant puts in his answer, his deposition cannot

Before answer put in.

(1) Williams v. Williams, 4 M. & S. 497.
(2) Ogle v. Paleski, Holt, N. P. C. 485. 2 Tidd. Pr. 863.
(3) Smith v. Veale, 1 Ld. Raym. 735.
(4) Backhouse v. Middleton and others, Chan. Cas. 175. Gilb. Ev. 56.

(*v*) See Note 662, p. 935. (*w*) See Note 663, p. 935.

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be read (1), because the opposite party had not the power of cross-examination; and the rule of common law is strict, that no evidence shall be admitted, but what is or might have been under the examination of both parties. "In such a case," says Ch. B. Gilbert (2), "the course is to move the Court of Chancery, that the deposition of the deceased witness should be read; and, if the court see cause, they will order it, and this order will bind the parties to assent to the reading of such depositions, though it does not bind the court of nisi prius."

The reason why depositions are not read in evidence, before the defendant has put in his answer, has been before mentioned to be, because it does not otherwise appear, that the adverse party had liberty to cross-examine. This reason will not apply, where the defendant is in contempt for refusing to answer. If the adverse party, says Ch. B. Gilbert, had been in contempt, then the depositions of the witnesses shall be admitted, for then it is the fault of the objector, that he did not cross-examine the witnesses, since he would not join the examination. (3) This subject came before the Court of King's Bench in the case of Cazenove v. Vaughan (4): from which it now appears to be clearly settled, that depositions are not allowed to be read in evidence, before answer put in, or before the party is in contempt, unless he has had an opportunity of cross-examining; but if he has had such an opportunity, and has omitted to avail himself of it, he cannot afterwards make that a ground for objecting to the depositions as evidence..

Sect. II.

Of Depositions. Inquisitions, Examinations, &c. &c.

Depositions on interrogatories.

Depositions are frequently taken with the consent of the parties to a suit, when a material witness is about to leave the kingdom, or resides abroad. (5) These depositions may be given in evidence, if at the time of the trial the witness has

(1) —— v. Browne, Hardr. 315. Duttou v. Colt, Sir T. Ray. 335. n. Ford v. Guy, cited in Howard v. Tremain, 1 Show. 363. Piercy v. ——, 2 Jon. 165. Bull. N. P. 240.

(2) Gilb. Ev. 57, 58. Bull, N. P., 240. And see Marden v. Bound, 1 Vern. 331.

(3) Gilb. Ev. 56.

(4) 1 Maule & Selw. 4.

(5) See Ante, p. 14. As to the mode of taking the examination on interrogatories, See 2 Tidd. Pr. 854.

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quitted the country (1); and they are admissible in criminal as well as in civil cases. (2) But if the trial comes on before his departure, or after his return, the depositions cannot be read. This rule, however, is not to be taken so strictly, as to make it absolutely necessary, that a witness, who is about to go abroad, should be on his voyage, when the trial comes on. If the ship has sailed, though it may have put back—or if the witness be on board, and the ship ready to sail, though prevented by contrary winds—that seems to be sufficient. (3) But it would not be sufficient to show, that the witness is a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving that some effort had been recently made to procure his attendance. (4)

Depositions in India.

Where an indictment or information is exhibited in the King's Bench for an offence committed in India, or where a suit has been commenced in any court in this country for a cause of action arising in India (5), the depositions of witnesses may be obtained under the provisions of the statute 13 G. 3. c. 63. ss. 40. & 44. This statute enacts that the court may award a writ of mandamus to the judges of the courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the court, upon oath administered according to the form of their several religions; and these depositions, duly taken and returned, in the form prescribed by the act, are to be allowed and deemed as good and competent evidence, as if the witnesses had been sworn at the trial, and examined *viva voce*. (6) (*x*)

Depositions in cases of felony

Depositions on the bailment or commitment of persons charged with felony, used to be taken in pursuance of the statutes, 1 & 2 P. & M. c. 13. and 2 & 3 P. & M. c. 10. They are now taken under the statute 7 G. 4. c. 64. which repeals the two earlier statutes. The second section of st. 7 G. 4. c. 64. enacts, that the two justices of the peace, before they shall commit to bail, and

(1) Anon. case, 2 Salk. 691.
(2) R. v. Morphew, 2 Maule & Selw. 602.
(3) Fonsick v. Agar, 6 Esp. N. P. C. 92. Ward v. Wells, 1 Taunt 461.
(4) Falconer v. Hanson, 1 Campb. 172.
(5) Francisco v. Gilmore, 1 Bos. & Pull. 177.
(6) Other statutes of a similar nature are cited in Chap. I. p. 15.

(*x*) See Note 664, p. 936.

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the justice or justices, before the committing to prison, shall take the examination of the person arrested for felony or on suspicion of felony, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; and such justices and justice respectively shall subscribe all such examinations, informations, bailments, and recognizances, and deliver, or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the Court.

Depositions in case of misdemeanor.

The third section of the same statute gives a power of taking informations in cases of misdemeanor, which had not before been given. It enacts, that every justice of the peace, before whom any person shall be taken on a charge of misdemeanor or suspicion thereof, shall take the examination of the person charged, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same or as much thereof as shall be material, into writing, before he shall commit to prison, or require bail from the person so charged; and shall subscribe all examinations and informations, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the Court, in like manner as in cases of felony. (*y*)

Before the statutes of Philip and Mary, a deposition taken before a justice of the county, where a felony was committed, would not have been evidence, even though the witness had died, or was unable to travel. (1)

The following decisions, which were made with reference to the statutes of Philip and Mary (under which heretofore depositions used to be taken, but which statutes have been repealed by st. 7 G. 4. c. 64.), appear to be equally applicable with reference to the repealing statute.

When evidence.

The deposition of a witness, taken upon oath (2), in the pre-

(1) 3 T. R. 710. 722. Dalton, Just. c. 111. p. 369. Bull. N. P. 242.
(2) Kelyng. Rep. 2. 1 Hale, P. C. 586. 2 Hal. P. C. 52. 120. 284.

(*y*) See Note 665, p. 936.

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sence of a prisoner (1), who has been brought before the magistrate on a charge of felony, may be given in evidence on the trial of an indictment for the same felony, if it be proved on oath, to the satisfaction of the Court, that the informant is dead (2),(*z*) or prevented by sickness from attending (3),(*a*) or that he is kept away by the means and contrivance of the prisoner(4); provided also, that the deposition, offered in evidence, is proved to be the same as was sworn before the justice, without any alteration. (5)

How taken.

The depositions ought to be taken as nearly as possible in the words used by the deponent; the statute requiring the magistrate to take the information of those who bring the prisoner, and *put the same, or as much thereof as shall be material*, in writing. It has been before observed, that the information should be taken in the presence of the prisoner, to give him an opportunity of cross-examining. (*b*) The prisoner is usually allowed to be present from the commencement of the examination; but in case any part of the information has been taken while he was not present, it will be necessary to have that part afterwards read over distinctly in the presence of the prisoner and the deponent; and if the deponent then swear to the truth of the statement in the prisoner's presence, this will be a regular taking of the information, and the deposition may be used against the prisoner. (6)(*c*)

Signing.

The new act requires the justices or justice to subscribe the examinations and informations; and the coroner to subscribe the evidence given before him, which is to be put in writing.

It is not essential to the validity of depositions, that they

(1) R. v. Payne, 5 Mod. 163, cited by Ld. Kenyon, 3 T. R. 723. Woodcock's case, 2 Leach, Cr. C. 566. R. v. Vipont, 2 Burr. 1163. R. v. Dingler, Leach, Cr. C. 638.

(2) 4th Res. in Ld. Morley's case, Kel. 55. Bromwich's case, 1 Lev. 180. Dalt. c. 111. p. 369. Adm. per Cur. in Payne's case, 1 Salk. 281. 1 Hal. P. C. 305. Bull. N. P. 242. Case of Fleming and Windham, 2 Leach, Cr. C. 996. Westbeer's case, 1 Leach, Cr. C. 14, (in which case the depositions were those of a deceased accomplice.)

(3) 1 Hal. P. C. 305, 586. 2 Hal. P. C. 52, 283. Kel. 55, the case of depositions before a coroner. Gilb. Ev. 124, and see infra, p. 372.

(4) Kel. 55. Fost. Disc. p. 337. Harrison's case, 4 St. Tr. 492. Vide infra, p. 372.

(5) 1 Hal. P. C. 305. 2 Hal. P. C. 52, 284. Kel. 55.

(6) R. v. Smith, 2 Starkie, N. P. C. 208. Holt, 614. S. C. Russ. & Ry. Cr. C. 339. S. C. It appears also, from the case of the King v. Crowther, 1 T. R. 125, that the witness should be re-sworn in the presence of the prisoner.

(*z*) See Note 666, p. 937. (*a*) See Note 667, p. 938. (*b*) See Note 668, p. 938. (*c*) See Note 669, p. 938.

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should be signed by the deceased witness. In Flemming's case, on an indictment for a rape, all the Judges concurred in opinion, that the depositions of a girl deceased, on whose person the crime had been committed, taken on oath by the committing magistrate, had been properly admitted in evidence at the trial, though the depositions were not signed by the deceased. (1)(*d*)

On oath.

Parol evidence.

The informations against the prisoner are to be taken on oath; the examination of the prisoner, not upon oath. (2)(*e*) And parol evidence, to add to, or vary the deposition, is not admissible. (3)(*f*)

Evidence in misdemeanors.

The information of a witness, taken before justices of the peace on a charge of misdemeanor, may now be given in evidence on the trial of that misdemeanor, under the provisions of the new act before referred to; but informations taken by justices are not evidence in civil actions, or on an appeal for murder (4), or on trials for high treason. (5). The information of a person complaining of an assault and robbery, has been held to be admissible, on a trial for the murder of that person, who died of the wounds received in the assault. (6)(*g*)

Not in civil cases, or high treason.

Petty treason.

On a charge of petty treason, informations, taken before a justice or coroner, seem to be admissible in evidence; for the offence of petty treason is substantially the same as the offence of murder. (7) But as the statute of 5 & 6 Edw. 6. c. 11. s. 12. requires the evidence of two lawful accusers in petty treason, no less than high treason, to warrant a conviction of the party accused (8), it is plain, that a conviction of petty treason cannot be grounded on such an information alone. (9) However, as a prisoner may be convicted of murder on an indictment for petty treason, depositions taken before a coroner, or informations taken on oath before justices of the peace, pursuant to the statute, are sufficient without any other evidence, to support a conviction of

(1) Case of Flemming and Windham, 2 Leach, Cr. C. 996.
(2) Vide supra, p. 113
(3) R. v. Thornton, Warw. Summer Ass. 1817, by Holroyd J and see R. Smith, supra, p. 114.
(4) R. v. Payne, 1 Ld. Raym. 729
(5) Fost. Disc. 336. 1 Hale, 306.
(6) R. v. Smith, Russ. & Ry. Cr. C. 340. n. This was decided against the opinion of Lord Tenterden: and the question arose under the stat. of Philip and Mary.
(7) See Foster, 336.
(8) Vide supra, p. 152.
(9) Foster, 337.

(*d*) See Note 670, p 939. (*e*) See Note 671, p. 939. (*f*) See Note 672, p. 939. (*g*) See Note 673, p. 939.

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murder, though not sufficient to support a conviction of petty treason. (1)

Deposition, taken in another county.

It often happens that the felon is taken and examined by a magistrate in a county, where the offence was not committed; in such a case, the examinations and informations are to be transmitted into the county where the felon is indicted, and may there be read in evidence against him, though the magistrate had not original cognizance of the offence. (2) (*h*)

Deposition, to contradict witness.

As informations, when judicially and regularly taken, are evidence against a prisoner, if the informant dies before the trial; so, on the other hand, where the informant himself gives evidence, the informations may be used for the purpose of contradicting his testimony. (*i*) One of the objects of the legislature in passing the statutes, was to enable the judge and jury, before whom the prisoner is tried, to see whether the witnesses at the trial are consistent with the account given by them before the committing magistrate. (3) It was admitted in Lord Stafford's case (4), that the deposition of a witness, taken before a justice of the peace, might be read, at the desire of the prisoner, in order to take off the credit of the witness, by showing a variance between the deposition and the evidence given in court *viva voce*. And it very commonly happens that judges point out such discrepancies to the notice of the jury. (5)

Depositions before coroner.

The 4th section of the 7 G. 4. c. 64. enacts, that every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessary to murder before the act, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material; and shall certify and subscribe the same evidence, and also the in-

(1) Radbourne's case, 2 Leach, Cr. C. 512. Fost. Disc. 106, 328, 337.

(2) Dalt. Just. c. 111. p. 369. 2 Hal. P. C. 285. Cro. Car. 213. And see st. 44 G. 3. c 92.

(3) See the judgment in Lambe's case, 2 Leach, Cr. C. 633.

(4) 3 St. Tr. p. 131. Hawk. P. C. b. 2. c. 46. s. 22. See 31 Howell's St. Tr. 834—838. Dr. Sheriden's case.—By the law of Scotland, the deposition of a witness cannot be produced at the trial to discredit his testimony. See Hume's Commentary on the Crim. Law of Scotland, vol. ii. p 367, and Burnett's Treatise, p. 464.

(5) See Olroyd's case, supra, p. 310.

(*h*) See Note 674, p 940. (*i*) See Note 675, p. 940.

Depositions.

quisition before him taken, and shall deliver the same to the proper officer of the Court in which the trial is to be, before or at the opening of the Court.

When evidence.

It has been held, in the construction of the statute of Philip & Mary, under which depositions before coroners used to be taken, (and the same decisions seem to apply equally to cases under the new statute, above cited,) that in case any of the witnesses, who have been examined before the coroner, are dead, or kept out of the way by the means and contrivance of the prisoner, or unable to attend from sickness (1), their depositions may be read on the trial of the prisoner; provided also, that the deposition, offered in evidence, is proved to be the same as was sworn before the coroner, without any addition or alteration.

Depositions in absence of prisoner.

It seems to be the general opinion, that the depositions taken by the coroner are admissible, though taken not in the presence of the person against whom they are tendered in evidence. With regard to depositions taken before *justices*, in the absence of the person charged, it is settled, that they are not admissible in evidence against him afterwards on his trial. (*j*) The statute of Philip & Mary, which first required *justices* to take examinations (and under which the examinations have been adjudged to be admissible in evidence), implies, that the person accused is present at the time of the enquiry; the words of the statute being, "that *he shall take the examination of the prisoner, and the information of those that bring him:*" and a similar provision is contained in the act recently passed. But in the statute of Philip & Mary, respecting the duties of the *coroner*, there is nothing from which such an inference can be made; for that statute only requires the coroner "*to put in writing the evidence given to the jury before him, and certify the same evidence at or before the time of the trial.*" Nothing is here said, as in the former case, respecting the taking of the examination of the *prisoner:* if there had been such a requisition, it could seldom be carried into effect; for the inquisition must be *super visum corporus*, that is, necessarily within a limited period; and it very commonly happens, that

(1) So held by all the Judges in Lord Morley's case, Kel. 55. 6 Howell's St. Tr. 770, 776. S. C. Harrison's case, 12 Howell's St. Tr. 851: 2 Hale P. C. 284. Gilb. Ev. 124.

(*j*) See Note 676, p. 940.

the person who did the act is unknown, or, if known, that he contrives to escape before the inquisition is held. The question as to the admissibility of depositions, taken before the coroner in the absence of the prisoner, must depend principally upon this, whether they can regularly be taken in his absence; and, considering the difference of the provision in the one statute from that in the other, it appears to be as regular, generally speaking, for the *coroner* to take the evidence in the absence of the prisoner, as it is for the justice to take the informations in his presence. Depositions.

The following references may be cited in favour of the admissibility of such evidence. A book of authority (1), after stating the general rule, that depositions are not evidence, where there cannot be a cross-examination, adds, by way of exception "yet, if the witnesses, examined on a *coroner's inquest*, be dead or beyond sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public, to make enquiry about the matters within his jurisdiction." In the case of the King against the Inhabitants of Eriswell (4), Mr. Justice Buller, in support of his opinion on the case then before the Court, stated, that depositions before a coroner had long been settled to be good evidence, though the person accused be not present when they are taken, nor ever heard of them till the moment when *they are produced* against him; and Lord Kenyon observed, that the case alluded to was an exception, founded on the statute of Philip & Mary (3): "besides," he added, "the examination before the coroner is an inquest of office: it is a transaction of notriety, to which every person has a right of access; and writs of *ad quod damnum* have been frequently set aside, for want of this notoriety in the execution of them by the sheriff." In Harrison's case, a deposition was admitted, which appears to have been taken in the absence of the prisoner (4): and in the case of King v. Purefoy, a deposition was admitted under similar circumstances, after an objection taken by the counsel for the prisoner. (5) (*k*) Authorities.

(1) Bull. N. P. 242.
(2) 3 T. R. 713. Vide infra, p. 376.
(3) 3 T. R. 722.
(4) 12 St. Tr. 853, Sim. 23. There were two depositions in this case. The second deposition describes the prisoner as being at that time in Newgate: and it may be inferred from the first that he was not present.
(5) Before Hotham B. Maidstone Sum. Ass. 1794. Peake, Ev. 68.

(*k*) See Note 677, p. 940.

Inquisition by coroner.

An inquisition of *felo de se*, taken before the coroner *super visum corporis*, is considered by Lord Coke to be conclusive evidence of the fact against the executors or administrators of the deceased (1) But Lord Hale, in his Pleas of the Crown (2), is of a different opinion, justly conceiving it unreasonable that they should be concluded, and lose the goods of the deceased without an answer, by an inquisition which may be taken by the coroner behind their backs. And it is now settled that such an inquisition may be removed into the King's Bench, and traversed by the executors and administrators of the deceased. (3) If it be found by the coroner's inquisition, in case of the death of one who is not *felo de se*, that the person who committed the offence, fled for it, the authorities hold this finding to be conclusive and not traversable; yet, upon principle, it seems that the one case is as properly traversable as the other. (4)

Inquisition of escheat.

There are various other kinds of inquisition of office, which, if regularly taken, and under a competent authority, will be admitted by courts of law, as evidence of the facts there found. Some inquisitions are taken on an enquiry made by the sheriff, or coroner or escheator, by virtue of their office, or under a writ directed to them for that purpose: others are taken by commissioners, especially appointed to examine witnesses on oath, and enquire into the several matters specified. These inquisitions are evidence of the facts there found, even against third persons. An inquisition of escheat, for instance, is evidence, in any suit and between any parties, that the person, who was the subject of enquiry, died without issue, as the commissioners have stated. This kind of inquisition is presented on the oath of a jury, and is a formal and solemn finding of the several facts. The escheators are bound to meet in a public and open place; and every person is to be allowed to give evidence openly in their presence. (5) (*l*)

(1) 3 Inst 55.

(2) 1 Pl. Cr. 416. 1 East, P. C. 389.

(3) See 1 Saund. 362, note 1, by the Editor, who has there collected the cases on this subject. As to the duty of the coroner in taking an inquest, see stat. 1 H. 8. c 8.

(4) See n. (3), and Hawk. b. 2. c. 9. s. 54.

(5) St. 1 H. 8. c. 8 An account of these inquisitions, *post mortem*, may be seen in the Report of the proceedings of Commissioners of Public Records, Append. (F. 1.) p. 63. An account also of inquisitions *ad quod damnum* may be seen in the same Report, App. (F. 2)

(*l*) See Note 678, p. 941.

Inquisition.

Inquisition on writ of extent.

On an inquisition also under a writ of extent, as to the effects, in possession of a party, a person claiming property in the effects, which are the subject of enquiry, may put questions to the witnesses examined on the part of the prosecutor; and if the sheriff refuse to allow such questions, the inquisition will be irregular, and the extent may on this ground be set aside. (1) (*m*)

Inquisition of lunacy.

An inquisition of lunacy is evidence on the trial of an indictment, to show that the prisoner was insane, when he committed the offence. (2) Such inquisitions are evidence even against third persons, who were strangers to the proceeding. Thus, in a case, where an inquisition of lunacy was offered as evidence to affect the rights of third persons, and objected against as *res inter alios acta*, Lord Hardwicke over-ruled the objection, and said, that inquisitions of lunacy, and likewise other inquisitions, as *post mortem*, &c., are always admitted to be read, but not conclusive. (3) And in an action upon a bond against the executors of the obligor, an inquisition of lunacy has been admitted, under the plea of *non est factum*, for the purpose of showing, that the obligor had been a lunatic from a certain time, as found by the inquisition. (4) (*n*)

By warrant of Court of Exchequer.

By order of House of Commons.

An inquisition taken by virtue of a commission, which issued in the reign of Queen Elizabeth, under the seal of the Court of Exchequer, to commissioners to inquire, whether a Prior was seised of certain lands as parcel of a manor, or whether the crown was seised of them after the dissolution of the priory, was adjudged to be good evidence of those facts. (5) And an inquisition, taken under an order of the House of Commons, is evidence respecting the fees of certain officers. (6) (*o*)

Inquisition by Sheriff, as to property.

Inquisitions, which are extrajudicial, are not admissible in evidence. Thus an inquisition made by a sheriff's jury, for the purpose of ascertaining, who was entitled to the property of goods taken under an execution, seems not to be admissible evidence even

(1) R. v. Bickley, 3 Price, 454.
(2) R. v. Bowler, O. B. June, 1812, before Le Blanc J. and Lord Ch. J. Gibbs.
(3) Sergeson v. Sealey, 2 Atk. 412.
(4) Faulder v. Silk and another, executors of Jervoise, 3 Campb. 126, before Lord Ellenborough C. J.
(5) Tooker v. Duke of Beaufort, 1 Burr, 146. Sayer, 297. S. C.
(6) Green v. Hewit, Peake, N. P. C. 184.

(*m*) See Note 679, p. 941. (*n*) See Note 680, p. 942. (*o*) See Note 681, p. 642.

Examination.

against the sheriff, in an action of trover brought by the party, in whose favour the inquisition was found. (1) This evidence was received at the trial of the cause by Mr. Justice Buller, who admitted it, but held it not to be conclusive; and a verdict having been found for the defendants, a motion was afterwards made for a new trial, on the ground, that the inquisition was conclusive evidence in favour of the plaintiff, as against the person who contested the property with the plaintiff, and who was present at the time of taking the inquisition. But the Court refused the application. Ch. J Eyre said, he doubted whether a sheriff can, strictly speaking, hold any inquisition as to property, except under a writ *de proprietate probanda* in replevin. And Mr. Justice Buller said, he thought he ought not to have admitted the evidence at the trial, as the inquisition was not under the king's writ, but merely a proceeding by the sheriff on his own authority. (*p*)

Not conclusive.

Not evidence.

Examination of pauper as to settlement.

The general rule, respecting the admissibility of depositions after the death of the witness, is, that they are not evidence, unless they have been taken judicially, and unless the party, whose interests would be affected by them, had an opportunity of being present and cross-examining the deponent. (*q*) It is therefore now clearly established, that the *ex parte* examination of a pauper concerning his settlement, taken on oath before magistrates, is not admissible, upon a question of settlement, as evidence against the appellant parish. (2) (*r*) The objection against their admissibility is, not that the magistrates have no power to administer an oath, but that the examination is *ex parte*, obtained at the instance of overseers, whose parish would be benefitted by the removal, and behind the backs of the appellants, who received no notice of the proceeding, and had not the benefit of a cross-examination (3); and there are no words (under which paupers in the statute 13 & 14 C. 2. c. 12. are removed,) expressly requiring the justices to take down any examination in writing.

(1) Latkow v. Eamer and Barnett, Sheriff of Middlesex, 2 H. Black. 437. Glossop v. Poole, 3 Malue & Selw. 175.

(2) R. v. Nuneham Courtenay, 1 East, 373. R. v. Ferry Frystone, 2 East, 54. R. v. Abergwilly, ib. 63.

(3) See R. v. Eriswell, 3 T. R. 725.

(*p*) See Note 682, p. 943. (*q*) See Note 683, p. 943. (*r*) See Note 684, p. 944.

Examination.

Examination of soldier.

In the mutiny act there is a special provision as to the examination of a soldier, respecting his settlement. This statute authorises any justice of the peace for the county, town or place, where any soldier shall be quartered, in case he has either wife or child, to cause him to be summoned before him in the place where he is quartered, in order to make oath of the place of his last legal settlement. And such justice is required to take his examination in writing, and give an attested copy of the examination to the person examined, to be by him delivered to his commanding officer, in order to be produced when required; which said *examination and attested copy* shall be at any time admitted in evidence as to such last legal settlement at any general quarter sessions of the peace, although the person examined be *dead or absent from the kingdom.* (1)

Examination in case of bastardy.

The examination of a single woman before a magistrate, under the statute 6 G. 2, c. 31, (which enacts, that, in case any single woman shall, in an examination to be taken in writing upon oath before any justice, &c., charge any person with having gotten her with child, it may be lawful for the justice to issue his warrant for the immediate apprehension of such person, &c.) will be evidence after the woman's death against the reputed father, on his appearance at the sessions to abide the order of the court according to his recognizance, although he was not present at her examination. (2) (*s*)

Examination of prisoners, as to settlement.

A justice of the peace is empowered, by st. 59 G. 3, c. 12, s. 28, to take in writing the examination of any person having a wife or child, who is a prisoner in a gaol, or house of correction, or in

(1) 3 G. 4, c. 13, s. 70, and 7 G. 4, c. 10. The first mutiny act which made such examinations admissible, was the 55 G. 3, c. 108, s. 70. That act did not contain the clause as to the *original examination* being admitted, nor the other clause which makes the examination admissible in case of the examinant's death, or absence from the kingdom. But the admissibility of such evidence was determined in R. v. Warley, 6 T. R. 534, and R. v. Warminster, 3 Barn. & Ald. 121, and afterwards expressly sanctioned by the mutiny act of 3 G. 4, c. 13, s. 70.

(2) R. v. Ravenstone, 5 T. R. 373. "The examination," (the Court is reported to have said,) "having been taken before a magistrate, in the course of a judicial proceeding, under st. 6 G. 2, c. 31, is certainly admissible evidence, like the depositions taken under the stat. of Philip and Mary." (1 & 2 Ph. & M. c. 13.) It is presumed, that the Court referred to the 5th section of that statute, respecting *Coroners*. For examinations taken by *justices* are not admissible against a prisoner who was not present.

(*s*) See Note 685, p. 944.

Examination.

the custody of the keeper of a gaol or house of correction, or in the custody of any peace officer under a warrant of commitment, touching the place of his or her last legal settlement; and such examination is to be signed by the justice, and shall be received and admitted in evidence as to such settlement before any justices, for the purpose of any order of removal, so long as the person so examined shall continue a prisoner.

Depositions in ecclesiastical courts.

Depositions taken in an ecclesiastical court, in a cause within its jurisdiction, seem to be admissible in evidence upon the same footing as depositions in the Court of Chancery, the parties being the same, and having had an opportunity of cross-examining the deponents. Chief Baron Gilbert lays down the rule thus: (1) "Depositions taken in the spiritual court in a cause relating to lands cannot be read, because they are no oaths at all, inasmuch as the spiritual courts have no authority to take depositions relating to lands: but it seems they may be read, when taken in a cause in which they have authority, as far as relates to that cause, inasmuch as these are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in a court of record." It does not appear, in any of the cases above mentioned, to have been thought essential to the admissibility of depositions, that they should be made in courts of record; but the material consideration was, whether they were taken judicially, and whether the other party, against whom they were offered in evidence, had any opportunity of cross-examining the deponent. There are some authorities, which hold, that depositions of witnesses in an ecclesiastical court are not to be admitted in courts of common law; (2) and one book of authority lays it down as a general rule, that depositions, taken in a court not of record, shall not be allowed in evidence elsewhere. (3) However, the better opinion seems to be, that such depositions are admissible in evidence, under the limitations above stated. (*t*)

Depositions before commissioners of excise.

Upon the principle above stated, Lord Holt was of opinion, in the case of Breedon v. Gill, (4) that depositions before com-

(1) Gilb. Ev. 60.
(2) Earl of Sarum v. Sir B. Spencer, 2 Roll. Abr. 679, pl. 5. Litt. Rep. 167. March, Rep. 120.
(3) Bull. N. P. 242.
(4) 1 Ld. Raym. 219, 222.

(*t*) See Note 686, p. 944.

missioners of excise, (who by the statute 12 Car. 2, c. 24, s. 45, have a power to administer oaths on enquiring into forfeitures,) taken in the presence of the other party, and signed by the witness, would be admissible on an appeal from the sentence of the commissioners, in case the witness should be dead at the time of hearing the appeal. Examination.

The affidavit of a person may be read against him, in a suit in which he is *party*, as an admission by him; (*u*) or may be used against him, in a cause in which he is *witness*, for the purpose of contradicting his testimony. (*v*) If the affidavit is filed as matter of record, the contents may be proved, in either of the cases just mentioned, by an examined copy, (as matters of record are usually proved;) after which there must be some proof, to show that the contents of the document are the statement of the individual against whom they are tendered in evidence. Proof that the original bears the handwriting and signature of that individual, will be sufficient for this purpose; or if he has admitted that he signed the original, that would be sufficient. Thus proved, the contents may be given in evidence, as an admission or statement; but not as an *affidavit*, or representation on the oath of the individual, without some additional positive proof of his having been sworn to its truth. If it is tendered in evidence against a witness, and he admits that he swore to its contents, this will be sufficient proof of the oath, for the purpose of contradicting him. (*w*) Affidavit. Filed.

If the affidavit has not been filed on record, it should be produced and proved by competent evidence to be the representation of the individual, as in the former case. If it has been lost or destroyed, so as not to admit of being produced, there appears to be no objection against receiving secondary evidence of its contents, as in other instances of non-existing documents. Not filed.

If an affidavit be made in any cause, proof of such cause depending, and that such affidavit was used by the party, would perhaps be sufficient proof of its being sworn even on an indictment for perjury, and certainly would be evidence in a civil suit. (1) Proof of swearing.

(1) Bull. N. P. 238.

(*u*) See Note 687, p. 944. (*v*) See Note 688, p. 944. (*w*) See Note 689, p. 944.

Award.

In an action against the defendant in the Common Pleas, for maliciously arresting the plaintiff in a cause in the same court, it appeared that the plaintiff had obtained a rule to set aside the arrest in that cause, and the defendant in opposing this rule had made an affidavit, the arrest was set aside, and the plaintiff paid the expense of obtaining his discharge; this affidavit was admitted in evidence against the defendant, without proof of his signature, or of his being sworn; and, in an argument on a special case, the objection taken at the trial against the admissibility was at once abandoned by the defendant's counsel. (1)(*x*)

Judgments of inferior courts.

Judgments in a court baron, county court, or hundred court, and the judgments of any other inferior court (*y*) recognised by the law of the land, (2) are evidence (*z*) between the same parties, (*a*) upon the same points in issue, on matters within their jurisdiction. Thus, in an action of debt on a judgment recovered in an inferior court, the judgment will be evidence of the debt; but the defendant may show, if he can, that the cause of action was not within the jurisdiction of the court below. (3)(*b*)

Award.

An award, regularly made by an arbitrator, to whom matters in difference are referred, is conclusive, in an action at law, on the parties to the reference, upon all matters enquired into within the submission. (4)(*c*) What has been before said on the subject of judgments by a court of concurrent jurisdiction, may be said also of awards, that they are, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question. (5)(*d*) Thus, in an action of ejectment, where the defendant and the lessor of the plaintiff had before referred to an arbitrator their respective claims to the property in question, the Court of King's Bench held, that the party had by his agreement concluded himself from disputing the lessor's title. (6)(*e*) It has been before observed, that an award is not a bar to any cause of action which the one party had against the other at the time of the reference, if it appear

(1) Cameron v. Lightfoot, 2 Black. Rep. 1191.
(2) Com. Dig. tit. Evidence, (C. 1.)
(3) Herbert v. Cook, reported in note (a), Willes, Rep. 36.
(4) See ante, p. 334.
(5) See ante, p. 321; and Campbell v. Twemlow, 1 Price, 81; and R. v. Cotton, 3 Campb 444.
(6) Doe, dem. Morris v. Rosser, 3 East, 15.

(*x*) See Note 690, p. 945. (*y*) See Note 691, p. 945. (*z*) See Note 692, p. 946. (*a*) See Note 693, p. 972. (*b*) See Note 694, p. 987. (*c*) See Note 695, p. 1025. (*d*) See Note 696, p. 1035. (*e*) See Note 697, p. 1037.

that the subject matter of the action was not enquired into before the arbitrator. (1) (*f*) Certificate.

Certificates of conviction are made evidence in several cases, by the express provisions of the legislature. On the trial of a prosecution, for a second offence in uttering counterfeit money, a certified transcript of a former conviction, by the clerk of the assize or clerk of the peace, containing in a few words the effect and tenor of the conviction, is sufficient proof of the former conviction. (2) On a prosecution, also, of a felon, for being at large unlawfully before the expiration of his term of transportation, a certified transcript of the indictment, of the conviction of the felon, and of the order for transportation, has been made sufficient proof, that the person, there named, has been before convicted, and ordered for transportation. (3) (*g*) Certificates. Of conviction.

The certificate of a vice-consul has been compared to a foreign judgment. But the vice-consul is not, properly speaking, a judicial officer; nor is his certificate to be admitted as evidence of the fact there stated. In the case of Waldron v. Coombe,(4) the Court of Common Pleas determined, that the certificate of a British vice-consul in a foreign country could not be received here as evidence of the amount of a sale, although by the law of that country he was constituted general agent for all absent owners of goods, and was authorized and compelled to make the sale in question. Of vice-consul.

A certificate of the king, under his sign manual, has been admitted in an old case, as evidence of a fact, in a suit on a promise of marriage;(5) the report states, that the certificate was allowed the proof *without exception*. But it is laid down in Rolle's Abridgment, (6) "that the king, as it seems, cannot be By the crown.

(1) Ravee v. Farmer, 4 T. R. 146, ante, p. 334.

(2) St. 15 G. 2, c. 28, s. 9. The st. 34, 35 H. 8, c. 14, contains provisions respecting the transmitting of certificates of outlawries, convictions, and attainders, into the court of K. B., by clerks of assize, &c. St. 3 W. & M. c. 9, s. 7, relates to certificates of prisoners having had benefit of clergy.

(3) St. 6 G. 1, c. 23, s. 6. Several other cases, in which similar transcripts are made evidence, may be seen in vol. i. of Russell's Treat. on Crimes, b. 2, ch. 36.

(4) 3 Taunt. 162. Roberts v. Eddington, 4 Esp. N. P. C. 88. R. v. Vyse, Forrest, 35.

(5) Abignye v. Clifton, Hob. Rep. 213. See 3 Woodeson, Lect. 275.

(6) 2 Roll. Ab. 686, (H.) Art. 1, citing the case of Abignye v. Clifton, contra.

(*f*) See Note 698, p. 1040. (*g*) See Note 699, p. 1042.

Certificate.

witness in a cause, by letters under his sign manual." And Lord Ch. Justice Willes, in his judgment in the case of Omichund v. Barker, (1) says, referring to this case in Hobart, "Even the certificate of the king, under his sign manual, of a matter of fact, has been always refused, except in one old case in Chancery."

Of minister.

A certificate under the seal of a minister abroad, as to the fact of a marriage having been solemnized before him, was admitted also in an old case; (2) (*h*) but the admissibility of such evidence has been questioned; (3) and it cannot be doubted, but that the evidence would now be rejected. A certificate from the secretary at war, as to the nature of the station of a sergeant in the army, is said to have been admitted, though opposed, in the case of Lloyd v. Woodal; (4) but for what reason, or upon what principle is not stated. (*i*) The general rule is, that our law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. (5) (*j*)

Of secretary at war.

Of justices.

A certificate of justices, certifying that a highway, which is the subject of an indictment, is in a state of repair, is admitted, in common practice, as an adjudication of the state of repair, after a plea of guilty pleaded by the parish. (6) (*k*) A certificate of the enrolment of a fine is evidence of the enrolment, for the reason mentioned in the following chapter. A protest, as to the presentment and non-acceptance of a foreign bill of exchange, attested by a notary public, is evidence of those facts, in an action upon the bill: this is a relaxation of the strict rule, from a principle of general convenience. (7) (*l*) A certificate of the discharge of an insolvent debtor by the quarter sessions, under the insolvent act of 2 G. 2, c. 20, has been admitted as evidence of the fact of his discharge. (8) (*m*)

Of enrolment.

Protest.

(1) Willes, Rep. 550.
(2) Alsop v. Bowtrell, Cro. Jac. 541.
(3) Willes, Rep. 549.
(4) 1 Black. Rep. 29.
(5) By Willes, C. J., Willes's Rep. 550.
(6) 6 T. R. 630, 635.
(7) Willes, 550.
(8) Gillum v. Stirrup, Rep. temp. Hard. 144. Action of debt on bond; discharge pleaded in bar. As to proof of discharge of an insolvent debtor, vide supra, p. 219.

(*h*) See Note 700, p. 1043. (*i*) See Note 701, p. 1044. (*j*) See Note 702, p. 1044.
(*k*) See Note 703, p. 1051. (*l*) See Note 704, p. 1052. (*m*) See Note 705, p. 1054.

CHAP. V.

Of the Proof of Records and Judicial Proceedings.

THE admissibility of judicial proceedings having been treated of in the preceding chapters, it remains to consider, how their contents are to be regularly proved, so as to render them producible in evidence.

Records. Records are, for security, preserved in public depositories, and, as they cannot be removed from place to place to serve a private purpose, examined copies are admitted as the best producible evidence. (1)

Public statutes. Public acts of parliament are presumed by the law to be known to every individual. Printed copies, therefore, of public acts, and the printed statute-books, are resorted to by courts of justice, not strictly as evidence, but as serving to refresh the memory. (2)(*n*) And by the statute 41 G. 3, c. 90, s. 9, made for better and more effectual proof of the statute-law of this country in Ireland, and of the Irish statute-law in Great Britain, it is enacted, that copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorized, shall be received as conclusive evidence of the several statutes in the courts of either kingdom.

In some acts of parliament, not relating to the kingdom at large, a special clause is often inserted, declaring them to be public acts. Such acts are to be considered on the same footing, and of the same authority, in courts of justice, as those above mentioned; and proof of the contents will be as unnecessary in this case, as where a statute is public without the aid of such special clause. (*o*)

Private acts. A clause is also frequently inserted in some private acts, providing that they shall be printed by the king's printer, and that

(1) Leighton v. Leighton, 1 Str. 210. (2) Gilb. Ev. 8.
Vide supra, p. 317.

(*n*) See Note 706, p. 1055. (*o*) See Note 707, p. 1056.

a copy, so printed, shall be admitted as evidence of the act. In such cases, a copy, purporting to be printed by the king's printer, will be admissible in evidence.

When a private act of parliament, not containing such a clause, is required in evidence, the regular proof if by an examined copy, compared with the original in the parliament-office at Westminster. Even in the case of a private statute, however, if one of the parties to the suit has done an act under the statute, against which act the other party appeals, and the regularity of which proceeding is the question to be tried, there the appellant will not be obliged to produce an examined copy, but a common printed copy will be sufficient. (1) (*p*)

Copy of record.

Copies of records in courts of justice are of two kinds; under seal, and not under seal. Those under seal are called exemplifications, and are of higher credit than any sworn copy: for "the courts of justice, that put their seal to the copy, are supposed more capable than a common person to examine, and more exact and critical in their examination. (2) These exemplifications are of two kinds; under the great seal of Chancery, or under the seal of some other court. (3)

Copy under seal.

1. The practice is not to exemplify a record under the great seal, unless it be either a record of the Court of Chancery, or be sent from some other court into Chancery, the centre of all courts, by writ of *certiorari*. But in either of these cases a copy may be obtained, under the attestation of the great seal. (4)

Record in issue.

If the record of a court is put in issue by a proceeding in the same court, the record itself is inspected by the Judges. (*q*) But when the record, denied by the issue, is in a court of superior or concurrent jurisdiction, the trial is then by the tenor of the record, which may be obtained by *certiorari* and *mittimus* out of

(1) R v. Shaw, 12 East, 479. Appeal against a rate, made by the respondent under a private act. In this case, as Mr. Justice Le Blanc observed, the respondent ought to begin, by showing that he had a right to make the rate under the act.

(2) Gilb. Ev. 11, 12.
(3) Gilb. Ev. 12.
(4) 3 Inst. 173. Gilb. Ev. 12. Bull. N. P. 226

(*p*) See Note 708, p. 1056. (*q*) See Note 709, p. 1057.

Chancery, (1) a method adopted for the purpose of communicating evidence of records from one superior court to another, without the inconvenience of removing the originals. (*r*) If the record of an inferior court is disputed in a suit before a higher tribunal, the *certiorari* may be issued out of the superior court, as well as from the Court of Chancery. (2) And in pursuance of this writ, where the superior court sends for the record of an inferior court, not for the purpose of seeing whether their proceedings are within the limits of their jurisdiction, but merely to know whether there be in fact such a record, it will be sufficient to certify the tenor, that is, a literal transcript of the record. (3) But where the record itself is the subject of the proceedings in the superior court, the original ought to be returned. (3) (*s*)

Exemplification.

When records are exemplified, the whole, in general, must be exemplified, for the construction is to be taken from a view of the whole together: and nothing but records can be proved by an exemplification. (*t*) Private deeds, exemplified under the broad seal, will not be admitted in evidence: for as the deeds themselves are in the custody of the party, they ought to be produced, that the court may see, whether there are any erasures or interlineations. (4)

Seals of courts.

2. The second sort of copies under seal are exemplifications of the record of a court under its own seal; and they also are considered to be of higher credit than sworn copies. (*u*) The seal of the king, and of the public courts of justice, and of all courts established here by act of Parliament, are admitted in evidence without extrinsic proof of their genuineness; (*v*) as, for example, the seal of the county palatine of Chester, (5) or of the great sessions of Wales, (6) or the seal of the ecclesiastical court on an exemplification of a will. (7) But the seals of private courts, or of a

(1) Luttrel v. Lea, Cro. Car. 297. Pitt v. Knight, 1 Saund. 98. Hewson v. Brown, 2 Burr. 1034.

(2) Butcher and Aldworth's case, Cro. Eliz. 821. Guilliam v. Hardy, 1 Ld Raym. 216.

(3) Woodcraft v. Kinaston, 2 Atk. 317.

(4) Bull. N. P. 227.

(5) Dyer, 276, cited in Olive v. Gwin, 2 Sid. 146. Tooker v. D. of Beaufort, Sayer, 297, where the exemplification was under the seal of the Court of Exchequer.

(6) Dyer, 276, cited in Olive v. Gwin, 2 Sid. 146. Hardr. 118, S. C. Gilb. Ev. 16.

(7) Kempton, dem. Boyfield, v. Cross, Rep. temp. Hard. 108.

(*r*) See Note 710, p. 1057. (*s*) See Note 711, p. 1057. (*t*) See Note 712, p. 1058. (*u*) See Note 713, p. 1059. (*v*) See Note 714, p. 1061.

Seal of corporation.

foreign colonial court, (1) (*w*) or of a corporate body, (2) ought to be proved by a witness acquainted with their impression. (*x*) It is not, however, necessary to prove the seal of a corporation in the same manner as the seal of an individual, that is, by producing a witness, who saw the seal affixed to the identical instrument; but when an instrument purports to be under the seal of a corporation, it will be sufficient to show, that the seal is the official seal of the corporate body. (3) (*y*)

Copy not under seal.

3. Copies of records, not under seal, are also of two kinds; sworn copies, and office copies.

Records are complete, as soon as they are delivered into court in parchment, and there fixed as the rolls of the court. Of these, a sworn, that is, an examined copy, will be sufficient evidence for a jury, unless the record itself is in issue. But the copy of a judgment, signed by the master, is not evidence, though upon such judgment execution may be taken out: for it is not yet become permanent, and is removeable from place to place. (4) (*z*)

Examined copy.

Copies of records are to be proved, as other transcripts, by a witness, who has compared the copy, line for line, with the original, or who has examined the copy, while another person read the original; (5) (*a*) and it ought to appear, that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records were kept. (6) (*b*)

Proof of lost record.

Where an ancient record has been lost, a copy may be read without proving it a true copy. (*c*) An unexamined copy of a recovery of lands in ancient demesne has been received where the original was lost, and where possession had gone for a long time according to the recovery. (7) And similar proof has been

(1) Henry v. Adey, 3 East, 221.

(2) Moises v. Thornton, 8 T. R. 307.

(3) 8 T. R. 307. Chadwick v. Bunning, 1 Ry. & Mo. N. P. C. 306. In Woodnas v. Mason, 1 Esp. N. P. C. 53, it was held by Lord Kenyon that the seal of the city of London proves itself.

(4) Bull. N. P. 228.

(5) Reid v. Margison, 1 Campb. 470. Rolf v. Dart, 2 Taunt. 52 M'Niel v. Perchard, 1 Esp. N. P. C. 263. Gyles v. Hill, 1 Campb. 471, n.

(6) Adamthwaite v. Synge, 1 Starkie, N. P. C. 183; 4 Campb. 372, S. C.

(7) Anony. case, Ventr. 257. Bull. N. P. 228. Green v. Ronde, 1 Mod. 117.

(*w*) See Note 715, p. 1062. (*x*) See Note 716, p. 1062. (*y*) See Note 717, p. 1062. (*z*) See Note 718, p. 1063. (*a*) See Note 719, p. 1065. (*b*) See Note 720, p. 1065. (*c*) See Note 721, p. 1066.

allowed of the decree in the time of Henry the Eighth for tithe in London, that decree having been lost. (1) In such cases, says Ch. B. Gilbert, the instrument must be according to the rule of the civil law, *vetustate temporis aut judiciariâ cognitione roboratum.* (2)(*d*)

A lost record may be proved by other competent evidence besides a copy. Lord Holt said, in the case of Thurston v. Slatford, (3) he remembered a case where the university of Oxford entitled themselves to a presentation by a conviction of the Earl of Shrewsbury for recusancy, and upon giving some evidence that the record was lost, the university was permitted to prove the effect of it by other evidence. (*e*)

Office copies.

An office copy is, in the same court, and in the same cause, equivalent to a record; but in another court, or in another cause in the same court, the copy must be proved. (4)(*f*)

Copy by officer authorized

A distinction is to be made between a copy authenticated by a person trusted for that purpose, and a copy given out by an officer of the court, who is not trusted for that purpose; in the former case, the copy is admissible in evidence, without proof of its having been actually examined, for the law will trust such officer, as far as he acts under its authority; but the copy is not admissible in the latter case. (5)(*g*) The chirograph of a fine, for example, is evidence of the fine, the chirographer being appointed to give out copies of the agreements between the parties, which are entered of record. (6) An indorsement by the proper officer on a deed of bargain and sale, enrolled according to the form of the statute 27 H. 8, c. 16, is evidence of the enrolment: (7) and an indorsement of the date of enrolment, by the clerk of the enrolments, is part of the record, and conclusive as to the date. (8)(*h*) So, where it became necessary

Chirograph.

Enrolment.

(1) Ventr. 257. Knight v. Dauler, Hardr. 323. Thurston v. Slatford, 1 Salk. 284, by Holt, C. J. Bull. N. P. 228. Macdowgal v. Young, 1 Ry. & Mo. 393.

(2) Gilb. Ev. 19.

(3) 1 Salk. 284.

(4) By Lord Mansfield, in Denn, dem. Lucas v. Fulford, 2 Burr. 1180, 1181; and see 2 Starkie, N. P. C. 13, 14.

(5) Bull. N. P. 229.

(6) Gilb. Ev. 21. 2 Starkie, N. P. C. 13.

(7) By Buller, J. in Kinnersley v. Orpe, 1 Doug. 56.

(8) The King in aid of Reed v. Hopper, 3 Price, 495. The same rule with respect to the date of the enrolment of a memorial of annuity-deeds; Garrick v. Williams, 3 Taunt. 540.

(*d*) See Note 722, p. 1066. (*e*) See Note 723, p. 1067. (*f*) See Note 724, p. 1068. (*g*) See Note 725, p. 1069. (*h*) See Note 726, p. 1069.

for the plaintiff to show, in proof of his title, that a certain lease had been enrolled with the auditor of the Duchy of Lancaster, the Court of King's Bench held, that a memorandum of enrolment, on the margin of the lease, signed "A. B. auditor," was sufficient proof of the enrolment. (1)*

Rule of court.

A rule of court, under the hand of the proper officer, is itself an original, and may be given in evidence in a legal proceeding in that court, without being proved a true copy. (2) (*i*) So, in a case where a witness, being about to leave the country, had been examined at a Judge's chambers upon interrogatories, a copy of his deposition, delivered out by the clerk of the Judge, and signed by the Judge, has been admitted in evidence, without proof of its being examined and compared with the original deposition. (3)

Copy by officer unauthorized

Where the officer of the court is only entrusted with the custody of records, and is not authorised to make out a copy, he has no more authority for that purpose than a common person; (*j*) and the copy must be regularly proved in a strict and regular mode.

Judgment.

A copy of a judgment, though purporting to be examined by a clerk of the Treasury, is not admissible, without proof of its having been examined; because it is no part of the necessary office of the clerk to deliver a copy; he is only entrusted to keep the records for the benefit of public perusal, and not to make out copies of them. (4)

Enrolment.

If a deed enrolled be lost, a copy of the enrolment, made out by the clerk of the peace, but not proved to be examined, is not admissible. (5)

Depositions.

The office copies of depositions, taken in Chancery, though they are evidence in the Court of Chancery, where officers are entrusted for that purpose, will not be admitted in courts of common law, without examination with the roll. (6) And where

(1) Kinnersley v. Orpe, 1 Doug. 56.
(2) Selby v. Harris, 1 Ld. Raym. 745. Bull. N. P. 229.
(3) Duncan v. Scott, 1 Campb. 101.
(4) Bull. N. P. 229.
(5) Ibid.
(6) Gilb. Ev. 21. Bull. N. P. 229. 2 Starkie, N. P. C. 13.

* An examined copy of the memorial of an assignment of a judgment (the memorial being required by act of parliament) is evidence of *the fact of assignment*. And an examined copy of the memorial of the registry of a deed, is evidence of the fact *of the registry*. Hobhouse v. Hamilton, 1 Schoal. & Lef. 207.

(*i*) See Note 727, p. 1069. (*j*) See Note 728, p. 1070.

a fine is to be proved with proclamations, as it must be to bar a stranger, the proclamations ought to be examined with the roll; for though the chirographer is authorised to make out copies of the fine itself, he is not appointed to copy the proclamations. (1) Proclamations.

When a verdict is offered in evidence, as the opinion of a jury on certain points in issue, it will be necessary also to produce a copy of the judgment founded upon the verdict. The production of the postea alone is not sufficient; for it may happen that the judgment was arrested, or a new trial granted. (2) (*k*) But this rule will not apply to the case of a verdict on an issue directed out of Chancery, as it is not usual to enter up judgment in such a case; and here, therefore, the decree of the Court must be shown, which will be sufficient proof, that the verdict was satisfactory, and stands in force. (3) Verdict. Postea. Issue.

Though the *nisi prius* record with the postea indorsed, is not generally evidence of the verdict, it is good and proper evidence, that the cause came on to be tried. (4) (*l*) And, in an action by the plaintiff, to recover a moiety of the money paid by him under a verdict, which a third person had recovered in a suit against him and the defendant, as co-defendants, the *nisi prius* record, with the postea indorsed, will be evidence of the verdict and damages in the former suit, without proof of the judgment. (5) (*m*) In the case just cited, of Fisher v. Kitchingman, Willes, C. J. doubted, whether the associate was the proper person to produce the postea in evidence; because, by several rules of court, it ought to be returned into court to the proper officer, within the four days of the next term; but, on the prothonotary's informing the court, that scarcely one postea in a hun- Nisi prius record.

(1) Gilb. Ev. 21. Allen's case, Bull. N. P. 229. 3 Taunt. 166. Doe, dem. Hatch v. Bluck, 6 Taunt. 486, 487, S. P.

(2) Bull. N. P. 234. Fisher v. Kitchingman, Willes, 367. Garland v. Scoones, 2 Esp. N. P. C. 646, contra.

(3) Montgomerie v. Clarke, at the Delegates, 1745. Bull. N. P. 234.

(4) Pitton v. Walter, 1 Str. 161. Fisher v. Kitchingman, Willes, 368. R. v. Page, 2 Esp. N. P. C. 649, n. 6 Esp. N. P. C. 83, S. C.

(5) Foster v. Compton, 2 Starkie, N. P. C. 365. By Tenterden, C. J. The postea, in this case, with the Master's allocatur indorsed upon it, was offered also as evidence of the costs: the Lord Ch. Justice doubted whether this was sufficient proof of the costs. The plaintiff, however, was allowed to take a verdict for the whole demand, subject to be reduced afterwards, if the court should think it right.

(*k*) See Note 729, p. 1070. (*l*) See Note 730, p. 1071. (*m*) See Note 731, p 1071.

dred was so returned, he was of opinion, that this objection was not of sufficient weight to set aside the verdict.

Judgment.

The final judgment of a court is proved by an examined copy of the judgment, entered of record on the judgment-roll, which is filed in the treasury of the court. It will not be regularly proved by the judgment-book of the court; although the record of the judgment-roll may not have been made up, and though the party interested in the proof of such judgment, was not a party to the suit, in which the judgment was obtained. (1)(*n*)

Writs.

When a writ is only inducement to the action, the fact of taking out the writ may be proved without a copy, because possibly the writ might not have been returned, and then it is not a record. (*o*) But where the writ itself is the gist of the action, there ought to be a copy from the record, as the best proof of which the nature of the case is capable. (2)(*p*) If it be necessary to prove, that a writ issued in a particular cause, it will not be sufficient to prove the *præcipe* by the filazer's book, and after proof of notice to produce the original, to give in evidence a copy of the writ; but a proper search must be proved to have been made at the Treasury for the original writ, before secondary evidence can be given.(3)(*q*) An examined copy of the judgment-roll, containing the award of an

Elegit.

elegit and return of the inquisition, is evidence, in an action for use and occupation, of the title of the plaintiff, who claims under the *elegit*, without proving a copy of the *elegit* and of the inquisition; (4)(*r*) the judgment-roll is absolute proof of all the proceedings, which it sets forth. (*s*)

Fieri facias.

If an action of trespass, for taking goods in execution, is brought by the party, against whom the writ of *fiera facias* issued, it will be sufficient for the officer to give the writ in evidence, without showing a copy of the judgment. (*t*) But if the plaintiff

(1) Ayrey v. Davenport, 2 New Rep. 474. The judgment book was produced in this case by the officer of the court, on the part of the defendant, and notice had not been given to the plaintiff to produce the judgment-paper.

(2) Gilb. Ev. 34. Bull. N. P. 234.

(3) Edmonstone v. Plaisted, 4 Esp. N. P. C. 160.

(4) Ramsbottom v. Buckhurst, 2 Maule & Selw. 565.

(*n*) See Note 732, p. 1072. (*o*) See Note 733, p. 1076. (*p*) See Note 734, p. 1076. (*q*) See Note 735, p. 1076. (*r*) See Note 736, p. 1077. (*s*) See Note 737, p. 1078. (*t*) See Note 738, p. 1078.

is not the party, against whom the writ issued, and claims the goods by a prior execution or sale, the officer, in order to prove the sale or the execution fraudulent, must produce not only the writ, but also a copy of the judgment. In the first case, he will justify himself, by proving that he took the goods in obedience to a writ issued against the plaintiff; but, in the other case, the goods do not *prima facie* belong to the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within the statute 13 Eliz. c. 5, against fraudulent alienations, &c. for which purpose it will be necessary to show a judgment. (1)(*u*)

Sheriff's return on writ.

The return of the sheriff upon a writ, which has been duly returned and filed, (*v*) is *prima facie* evidence of the fact there stated, when that fact comes incidentally into question, even in an action between third persons. If the sheriff return a rescue, the court above to which the return was made, would give it such credit, as to issue an attachment in the first instance; though, upon an indictment for a rescue, the defendant might show, that the return was false. (2) And so in an action for maliciously suing out an *alias fieri facias*, after a sufficient execution under the first *fieri facias*, the Court of King's Bench held, that the sheriff's return annexed to the writs (in which he stated, that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the plaintiff,) had been properly admitted at the trial as evidence of that fact, in support of a plea of licence pleaded by the defendant; for, as the Court said, faith ought to be given to the official act of a public officer like the sheriff, even where third persons are concerned. (3) But though the sheriff's return is *prima facie* evidence that he has levied, it affords no proof, that he has paid over the money to the judgment-creditor, so as to charge him in an action with the receipt. (4) (*w*)

(1) Lake v. Billers, 1 Ld. Ray. 733. Martin v. Podger, 2 Black. Rep. 701. Bull. N. P. 234, a

(2) R. v. Elkins, 4 Burr. 2129. There are several cases, in which the indorsement on the writ has been admitted as evidence *against the sheriff*, who makes the return. Blatch v. Archer, Cowp. 63. M'Neil v. Perchard, 1 Esp. N. P. C. 263. Jones v. Wood, 3 Camph. 229. Fairlie v. Birch, 3 Campb. 397.

(3) Gyfford v. Woodgate, 11 East, 297.

(4) Cator v. Stokes, 1 Maule & Sel. 599.

(*u*) See Note 739, p. 1082. (*v*) See Note 740, p. 1083. (*w*) See Note 741, p. 1083.

Inquisition.

When an inquisition is offered in evidence, the commission, under which it was taken, ought regularly to be proved, or shown to be lost. But in cases of more general concern, such as the minister's return to the commission in the reign of Hen. 8, for enquiring into the value of livings, a copy of the whole record need not be taken, and the commission is of such public notoriety as not to require any proof. (1)(*x*)

Common recoveries.

It is enacted by statute 14 G. 2, c. 20, s. 4, (made for the purpose of protecting purchasers, in cases where recoveries have not been entered on record,) that, where any person has purchased any estate, whereof a recovery was necessary to be suffered in order to complete the title, such person, and all claiming under him, having been in possession of the purchased estate from the time of the purchase, may, after the end of twenty years, produce in evidence the deed making a tenant to the writ of entry, or other writ for suffering a common recovery and declaring the uses: and the deed so produced, execution thereof being duly proved, shall in all courts be deemed good and sufficient evidence for the purchaser, and all claiming under him, that the recovery was duly suffered and perfected according to the purport of the deed, in case the record of recovery cannot be found, or should not appear to be regularly entered. And, by the fifth section of the same act, every common recovery shall after the expiration of twenty years from the time of suffering thereof, be deemed valid to all purposes, if it appear on the face of the recovery, that there was a tenant to the writ, and if the persons, joining in the recovery, had a sufficient estate, to suffer the same; notwithstanding the deed, for making the tenant to such writ, should be lost or should not appear.

Decree in Chancery.

A decree in the Court of Chancery may be proved by an exemplification under the seal of the Court; or by a sworn copy; or by a decretal order in paper, with proof of the bill and answer. (2) (*y*) But it has been held, that the bill and answer need not be proved, if they are recited in the decretal order. (3)(*z*) And

(1) Bull. N. P. 228. Hardcastle v. Sclater, 2 Gwill. 787.
(2) Trowel v. Castle, 1 K. b. 21. Com. Dig. Ev. (C. 1,) p. 94.
(3) By Trevor, C. J. in Wheeler v. Lowth, cited Com. Dig. ib. 1 Keb. 21, contra.

(*x*) See Note 742, p. 1097. (*y*) See Note 743, p. 1097. (*z*) See Note 744, p. 1097.

it is said in a book of authority, (1) that if a party wants to avail himself of the decree only, and not of the answer, the decree, ander the seal of the Court and enrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to show, that the point in issue was not the same as the present issue. (*a*) However, the rule, generally laid down, seems to be, that, where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as, that a decree was made by the Court,) he ought regularly to give in evidence the proceedings upon which the decree is founded. (*b*) "The whole record," says Ch. B. Comyns, "which concerns the matter in question, ought to be produced."(2) So, a sentence in the Admiralty Court may be evidence, upon the libel and answer produced: (*c*) and a judgment in a court-baron, or other inferior court, with proof of the proceedings in which the judgment was given." (3)

If the fact to be shown, were merely, that a decree has been made in the Court of Chancery, or that a decree, made there, has been reversed on appeal, proof of the previous proceedings will not be necessary. (4) (*d*) And in the case of an ancient decree, if the bill and answer cannot be found after proper search, the decree alone may be admitted. Ancient decree.

An answer cannot be regularly given in evidence without proof of the bill; for without the bill there does not appear to be a cause depending. But if there be proof by the proper officer, that the bill has been searched for in the office, and cannot be found, the answer has been allowed to be read without a sight of the bill. (5) (*e*) As the defence in Chancery is upon oath, it will be presumed, in ordinary cases, that the answer was sworn to by the defendant. Answer.

When an answer is offered in evidence as an admission of the party upon oath,(6) (*f*) or when it is used for the purpose of contra- As an admission.

(1) Bull. N. P. 235, citing Lord Thanet v. Paterson, K. B. East, 12 G. 2.
(2) Com. Dig. tit. Evid. (A. 4.) p. 85.
(3) Com. Dig. tit. Evid. (C. 1,) p. 94.
(4) See Jones v. Randall, Cowp. 17.
(5) Gilb. Ev. 49.
(6) Lady Dartmouth v. Roberts, 16 East, 334. Salter v. Turner, 2 Campb. 87. 3 Campb. 401.

(*a*) See Note 745, p. 1098. (*b*) See Note 746, p. 1098. (*c*) See Note 747, p. 1098. (*d*) See Note 748, p. 1098. (*e*) See Note 749, p. 1098. (*f*) See Note 750, p. 1099.

Deposition.

dicting a witness, (1) it will be sufficiently proved by an examined copy; nor will it be necessary to show, that there has been any decree in the suit. (2) If an examined copy is given in evidence, some proof of the identity of the party will be requisite; and this may be supplied by extrinsic proof, or by the proceedings themselves. In one case, the attorney of the party was called, to prove that the other party had filed the bill in equity against his client. (3) In another case, in which the action was brought against the defendant A. B. as administrator of C. D., and the defendant did not plead, that he was not administrator, it appeared, that the bill in equity had been also filed against A. B. as administrator of C. D.: and this was considered to be sufficient presumptive evidence, that the answer, purporting to be made by A. B. in that character, was the answer of the defendant. (4) (*g*) Proof of the signature of the party in the original answer, by a witness acquainted with the hand-writing, who has never inspected the original, will be sufficient, in such cases, to show that it is the answer of the party. (5)

Proof of swearing.

Stricter proof than an examined copy is required, on a prosecution for perjury alleged to have been committed by the defendant in his answer. Some evidence of the administration of the oath will there be required; as, that a person, calling himself by the defendant's name, was sworn, and that the signature on the answer, which must be produced, is his hand-writing; or that the answer is signed by the defendant, and that the jurat purporting to have been sworn before a master, is attested by the master's hand-writing. (6) (*h*) This strictness of proof is required not only in criminal proceedings, as on a trial for perjury, but also in actions which are in the nature of a criminal proceeding, as in an action for a malicious prosecution. (7)

Depositions.

With regard to depositions, the general rule is, that they are not to be admitted in evidence without proof of the bill and

(1) Ewer v. Ambrose, 4 Barn. & Cress. 25.
(2) Lady Dartmouth v. Roberts, 16 East, 334.
(3) Hodgkinson v. Willis, 3 Campb. 401.
(4) Hennell v. Lyon, 1 Barn. & Ald. 182.
(5) Dartnall v. Howard, 1 Ry. & Mo 169.
(6) R. v. Morris, 2 Burr. 1189. R. v. Benson, 2 Campb. 508.
(7) 16 East, 340.

(*g*) See Note 751, p. 1099. (*h*) See Note 752, p. 1099.

Deposition.

answer;(1) for, if there do not appear to be a cause depending, the depositions are considered to be mere voluntary affidavits; and the bill and answer ought to be produced, in order to show who were the parties to the suit, and what the points in issue, as depositions in general are evidence only upon the same points, and between the same parties, or those who claim under the parties. (2)(*i*) But depositions may be read without such antecedent proof, if they are so ancient, that no bill or answer can be forthcoming; formerly it was not the practice to enrol bills and answers. (3)(*j*) And if the defendant is in contempt, or has had an opportunity of cross-examining, which he chose to forego, the depositions may then be read, after proving the bill, although no answer has been put in. (4)

Lost bill and answer.

Depositions are evidence, as an admission, against a party to the suit—or for the purpose of contradicting a witness—without proof of the bill and answer: (*k*) but some proof of the identity of the person will be necessary.

Depositions taken on interrogatories, under a commission of modern date, are not admissible without the production of the commission, under the authority of which the depositions were taken: if the depositions are of a long standing, so that the commission may be presumed to have been lost, they are evidence by themselves: in either case, whether the depositions are of a recent or ancient date, there is no occasion to produce the bill and answer.(5)(*l*)

On interrogatories.

Where the Court of Chancery, on directing a trial at law, makes an order, that the depositions of a witness shall be read, the proof of the bill and answer will be dispensed with. This order is not made for the purpose of making that admissible in

Order to read.

(1) Gilb. Ev. 56. Bull. N. P. 240. Nightingale v. Devisme, 5 Burr. 2594, ad fin. Baker v. Sweet, Bumb. 91. Illingworth v. Leigh, 4 Gwill. 1619. At the trial of the last cited case, Mr. Just. Heath refused to admit depositions in evidence, because the bill and answer had not been duly proved, nor enquired after. But it is said by the reporter, that the rejection of this evidence was one of the grounds upon which a new trial was afterwards granted. And see Byan v. Booth, 2 Price, 234, n.

(2) See ante, p. 364.

(3) Byan v. Booth, 2 Price, 234, n. Gilb. Ev. 58.

(4) Cazenove and another v. Vaughan, 1 Maule & Selw. 4.[a]

(5) Baglie v Wylie, 6 Esp 85.

(*i*) See Note 753, p. 1099. (*j*) See Note 754, p. 1100. (*k*) See Note 755, p. 1100. (*l*) See Note 756, p. 1100.

Probate.

evidence, which is not strictly admissible in courts of common law;(1) and the depositions cannot be admitted, even under the order, unless it be satisfactorily proved at the time of the trial, that the witnesses are unable to attend in person. (*m*) If depositions were offered in evidence without such an order, the whole record, bill, answer, &c. must be regularly proved; but when there is an order for reading depositions, the court of law will read them, without going through the regular and strict course, which is generally necessary for the purpose of making them evidence. (2)(*n*)

Proof of depositions.

The proof of depositions is by an examined copy. Office copies are evidence in the Court of Chancery, but not in courts of common law, for a reason before mentioned. (3)(*o*)

Judgment in House of Lords.

Judgments in the House of Lords are not formally drawn up, but minutes only are entered on the Journals. The minutes of a judgment are the judgment itself, and they may be proved by an examined copy. (4)

Proceedings in inferior courts.

When the judgment of court-baron, or of any other court of inferior jurisdiction, is offered in evidence, (*p*) the proceedings, on which it is founded, ought to be shown;(5)(*q*) but as the proceedings are not usually made up in form, the minutes will be admitted, if they are perfect, and omit nothing material. (6)(*r*) If the proceedings in an inferior court are entered on the books of the court, they may be proved by the memorandum of such entry. (*s*) If they are not entered in the books, they may be proved by the officer of the court, or other person conversant of the fact. (7)

Probate of wills.

Testaments are proved in the ecclesiastical court either in common form, or in form of law. The first mode of proof is, where the executor presents the will before the judge, without citing the parties interested, and deposes, that it is the true

(1) 15 Ves. 176.
(2) Palmer v. Lord Aylesbury, 15 Ves. 176. Corbett v. Corbett, 1 Ves. & Beam. 340.
(3) See ante, p. 388.
(4) Jones v. Randall, Cowp. 17.
(5) See ante, p. 393.
(6) Fisher v. Lane, 2 Black. Rep. 834. Holt, C. J., in R. v. Hains, Comberb. 337.
(7) See 3 Barn. & Cress. 451, 453.

(*m*) See Note 757, p. 1101. (*n*) See Note 758, p. 1101. (*o*) See Note 759, p. 1102. (*p*) See Note 760, p. 1102. (*q*) See Note 761, p. 1104. (*r*) See Note 762, p. 1105. (*s*) See Note 763, p. 1105. (*t*) See Note 764, p. 1107.

and last will of the testator; upon which the Judge allows the will. The proof in form of law is, when the will is exhibited before the Judge in the presence of the parties interested, and after a full examination, finally allowed. (1) If the will be proved in common form, it may be disputed at any time within thirty years; but if it be proved in the more formal mode, and there be no proceedings within the time limited for appeals, the will cannot afterwards be disputed. (2) (*u*) After proof of the will, the original is deposited in the registry of the ordinary or metropolitan, and a copy in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been proved before him, which copy and certificate are the probate. A court of common law will not take notice of a will as a title to personal property till it is proved in the Ecclesiastical Court; (2) (*v*) and though the original will, together with the probate, is produced by the officer of the Ecclesiastical Court, the will cannot be read in evidence, unless it bears the seal of the court, or some other mark of authentication. (3) (*w*)

Probate.

What.

It is not the practice in the ecclesiastical courts to grant a second probate, if the first should be lost, but only to grant an exemplification from the record of the court, and this exemplification will be evidence of the proof of the will. (4) And an examined copy of a lost probate is evidence of the person there named, being executor, as the probate is an original, taken by authority, and of a public nature; (5) but a copy of the will would not be evidence of that fact. (6) The seal of the ecclesiastical court, on the probate, need not be proved. (7)

Exemplification.

Copy of probate.

The probate of a will, devising real property, is not evidence of the contents, in an action of ejectment, even to prove a relationship; (*x*) for where the original is in being, the copy is not admissible; and, besides, the seal of the court does not prove it a true copy, unless the suit relate only to personal property. (8)

(1) 3 Bac. Ab. 40, tit. Executor.
(2) Stone v Forsyth, 2 Doug. 707.
(3) R. v. Barnes, 1 Starkie, N. P. C. 243.
(4) Shepherd v. Shorthouse, 1 Str. 412. - Bull. N. P. 246.
(5) Hoe v. Nelthorp, 3 Salk. 154. 1 Ld. Raym. 154, S. C. Holt, C. J. in R. v. Haynes, Skin. 584.
(6) Bull. N. P. 246.
(7) Vide supra, p. 385.
(8) Bull. N. P. 246.

(*u*) See Note 765, p. 1117. (*v*) See Note 766, p. 1117. (*w*) See Note 767, p. 1117. (*x*) See Note 768, p. 1118.

Letters of administration.

Ledger-book.

Copy.

But the ledger-book, says Mr. Justice Buller, is evidence in such a case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove relationship, the rolls of the spiritual court, which has authority to enrol wills, are sufficient proof of such testament. (1) It has been often held, that a copy of the ledger-book is not evidence; yet since the original would be read as a roll of the court without further attestation, it sems fit, says Mr. Justice Buller, that the cpy should also be read. The contrary practice, he adds, has been founded upon the mistaken supposition that the ledger-book is read as a copy, when in fact it is read as a roll of the court. (1)

Revocation of Probate.

To prove that the probate of a will has been revoked, an entry of the revocation in a book of the prerogative court, in which all causes were entered by the registrar, and which was kept as the only record of such proceedings, and of the decree of the court, has been admitted to be good evidence. (2)

Letters of administration.

Certificate.

Book of acts.

Administration is generally granted by writing under seal. It may also be granted by entry in the registry without letters under seal. (3) The Ecclesiastical Court never grants an exemplification of letters of administration, but only a certificate, that administration was granted; therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence. (4) And the original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party, to whom administration of the intestate's effects is granted, without producing the letters of administration themselves (notwithstanding subsequent letters of administration granted to another,) if the first are not recalled; for the original book was the authority for the proper officer, to make out letters of administration, and the letters of administration were only the copy of the original minutes of the court, drawn up in a more formal manner. (5) (*y*)

(1) Bull. N. P. 246.

(2) Ramsbottom's case, 1 Leach, Cr. C. 30, n. (*c*.)

(3) Vin. Ab Executor, D. p. 70.

(4) Kempton, dem. Boyfield, v. Cross, Rep. temp. Hard. 108. Bull. N. P. 246

(5) Elden v. Keddell, 8 East, 187. Garret v. Lister, 1 Lev. 25 Bull. N. P. 246. 2 Maule & Selw. 567.

(*y*) See Note 769, p. 1118.

Award. Copy.

So, an examined copy of the act book, stating, that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce the letters of administration. (1)

Examinations before justice or coroner.

Informations taken before a justice of the peace or coroner, pursuant to the statutes of Philip and Mary, before they are admitted in evidence against the party accused, ought to be regularly proved by the justice or coroner, who took them, or by the clerk who reduced them to writing, to be the true substance of what the informer stated upon oath. (2)(*z*)

Foreign judgment. Seal.

In an action upon a judgment of a court of a foreign country, if the judgment is subscribed by the Judge of the court, and has a seal affixed, it must be proved by proving the hand-writing of the Judge, and the authenticity of the seal. (3) If a colonial court possess a seal, it ought to be used for the purpose of authenticating its judgments, although it may be so much worn as no longer to make any impression. (4) If it is clearly proved, that the court has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shown to possess some other requisite to entitle it to credit; (5) as, by proving the signature of the Judge upon the judgment. (6)

Proof of foreign judgment.

An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the court, is evidence of the judgment in the courts of this country. (7) But a document, purporting to be a copy of a judgment, and to be made by the officer of the court is not admissible. (8)(*a*)

Award.

The effect of an award has been before mentioned. (9)(*b*) In an action upon an award, it will be necessary to prove both the submission and the execution of the award. (*c*) And in general, whether the validity of the award comes into question directly,

(1) Davis v. Willi ms, 13 East, 232. Ray v. Clark, ib. 238, n. (*a*.)
(2) 2 Hale, P. C. 51, 284.
(3) Henry v. Adey, 3 East, 221. Buchanan v. Rucker, 1 Campb. 63. Flindt v. Atkins, 3 Campb. 215.
(4) Cavan v. Stewart, 1 Stark. N. P. C. 525.
(5) 2 Starkie, N. P. C. 11.
(6) Alves v. Bunbury, 4 Campb. 28.
(7) 2 Starkie, N. P. C. 11, 12, by Lord Ellenborough and Bailey, J.
(8) Appleton v. Lord Braybrooke, 6 Maule & Selw. 34. 2 Starkie, N. P. C. 6, 7, S. C.
(9) See ante, p. 380.

(*z*) See Note 770, p. 1120. (*a*) See Note 771, p. 1120. (*b*) See Note 772, p. 1135. (*c*) See Note 773, p. 1135.

Award.

or only incidentally, the submission of all the parties ought to be regularly proved. (*d*) Thus, where there had been a deed of reference, between a creditor and several partners, of all copartnership accounts, and of all matters in difference between the parties or any two of them, and an action of trover was afterwards brought by the creditor, the assignee under a commission of bankruptcy of one of the partners, (in which action the plaintiff produced the award and deed of reference, as evidence of a separate debt due to him from the bankrupt,) the Court of King's Bench held, that it was indispensably necessary to prove the execution of the deed by all the parties: for this was a reference of the aggregate accounts between all and each of the partners, and the consideration to each for entering into the submission was, that each party's accounts should be liquidated, not only as to one, but as to all; the access sion of all, therefore, ought to be proved; and, without such proof, the arbitrator would not appear to have competent authority to decide the whole question between the parties. (1)

Award of commissioners.

If the award, given in evidence, is the award of commissioners under an act of Parliament, the act ought to be produced, for the purpose of showing the authority of the commissioners, and that the award is conformable with the provisions of the statute, and, if the act is a private act, it must be regularly proved. (2)(*e*) If previous notices are required to be given, before the commissioners make their award, proof of the regularity of such notices will not in ordinary cases be necessary. But if the circumstances of the case raise a presumption, that all has not been regularly performed, then it will be incumbent on the party to prove the due performance. Thus, on the trial of an indictment against a parish for not repairing a highway, which was reputed to lie within the parish, and had been from time to time repaired by the inhabitants, an award made by commissioners of inclosure, awarding the highway to be situate in a different parish, was adjudged not to be admissible evidence for the defendants, because it was not proved, that the commissioners had given the previous notices, required by the inclosure act, to the parishes, who would be affected by their award; the circumstance of the

(1) Antram v. Chase, 15 East, 209. (2) See ante, p. 384.

(*d*) See Note 774, p. 1135. (*e*) See Note 775, p. 1136.

defendants having continued to repair after the award, raised a presumption, that there had not been such a notice as the act of parliament required. (1) Foreign law.

The existence of a foreign law is a fact to be proved, like any other fact, by appropriate evidence. Without such proof, our courts cannot take notice of foreign law. (2) The written law of a foreign state is to be proved by a copy of the law, properly authenticated. (3) The unwritten law of a foreign state, (having first been ascertained to be part of the unwritten law, by witnesses professionally conversant with the laws of the state,) may be proved by the parol evidence of witnesses, possessing competent professional skill. (4) (*f*) In the admirable judgment, delivered in the Consistory Court of London, in the case of Dalrymple v. Dalrymple, (5) Sir W. Scott, after observing, with reference to the law of marriage in Scotland, that the determination of the question must be taken from the authorities of that country, proceeds thus:—"The authorities to which I shall have occasion to refer, are of three classes; first, the opinions of the learned professors, given in the present or similar cases; secondly, the opinions of eminent writers, as delivered in books of great legal credit and weight; and, thirdly, the certified adjudication Proof of foreign laws.

(1) R. v. Inhabitants of Haslingfield, 2 Maule & Selw. 558.

(2) 1 P. Wil. 431. 3 Ves. & Beam. 99. Ganer v. Lady Laneborough, Peake. N. P. C. 17.

(3) Gen Picton's case, 30 Howell's St. Tr. 491. Boehtlinck v. Schneider, 3 Esp. N. P. C. 58. Miller v. Heinrick, 4 Campb. 155.*

(4) Miller v. Heinrick. 4 Campb. 155. See 3 Esp. N. P. C. 58.

(5) Dr. Haggard's Reports, vol. ii. p 81.

* In the case of Boehtlinck v. Inglis, 3 East, 381, the counsel for the plaintiff, after proving one of the mercantile navigation-laws of Russia, offered in evidence a certificate, (signed by the presiding Judge of the Custom-house Court in Russia, and bearing the seal of the Court,) which purported to have been delivered by the Judges to the plaintiff, with reference to the suit then commenced in this country; the certificate set out the navigation-law, and contained the opinion of the Judges of the Custom-house Court on its construction: the plaintiff's counsel insisted, that the certificate was admissible in evidence, not simply as a report of the opinion of the Court, but as an adjudication of the law certified under the seal of Court, and as entitled to the same credit as the exemplification of a foreign judgment. On the other side, it was argued, that the certificate was merely parol exposition of a written law, and entirely extra-judicial; and therefore not admissible. The Court of King's Bench decided the case upon other points, and did not express any opinion upon the question, as to the admissibility of the proposed evidence. The case of Middleton v. Janverin, in the Consistory Court of London, reported by Dr. Haggard, vol. ii. p. 442, may be referred to upon this subject.

(*f*) See Note 776, p. 1136.

Foreign law.

of the tribunals of Scotland upon these subjects. I need not say, that the last class stands highest in the point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court, which has to weigh them, *stare decisis*."

Law of colony.

If a question should arise, with respect to a colony, whether the law of the mother-country is the law of the colony, the statement of text-writers may be admitted. In General Picton's case, (1) where such a question was suggested as likely to occur, Lord Ellenborough said, "The text-writers furnish us with their statement of the law; and that would certainly be good evidence upon the same principle, which renders histories admissible. There is a case," continued Lord Ellenborough, "in which the history of the Turkish empire by Cantemir was received by the House of Lords and received after some discussion; I shall therefore receive any book, that purports to be a history of the common law of Spain."

Commercial regulations.

Acts of state.

The practice of a court of justice in a foreign country may be proved by witnesses professionally acquainted with that practice. (2) (*g*) The commercial regulations, of a foreign country, ought to be proved by well authenticated copies of such regulations. (3) The acts of state, also, of a foreign government can only be proved by copies of such acts, properly authenticated. (*h*) Thus, in the case of Richardson v. Anderson, (4) where the counsel on the part of the defendant proposed to give in evidence a book purporting to be a collection of treaties concluded by America, and to be published by the authority of the American government; and it was proposed, further, to prove, by the American minister resident at this court, that the book produced was the rule of his conduct; this evidence was offered, as equivalent to a regular copy of the archives in Washington: but Lord Ellenborough rejected the evidence, and held that it was necessary to have a copy examined with the archives.

(1) 30 Howell's St. Tr. 492.
(2) Buchanan v. Rucker, 1 Campb. 66.
(3) By Ld. Ellenborough, in Gen. Picton's case, 30 Howell's St. Tr. 491.
(4) 1 Campb. 65, (a.)

(*g*) See Note 777, p. 1145. (*h*) See Note 778, p. 1145.

In the case of Lacon v. Higgins, (1) Lord Tenterden admitted a copy of the civil code of France, produced by the French consul, and declared by him to be an authentic copy of the law of France, as recorded by the French courts, to be good evidence of the French law. Foreign law.

(1) K. B. sitt. after M. T. 21 Dec. 1822.

CHAP. VI.

Of Public Writings, not Judicial.

The next species of evidence, which the subject leads us to consider, relates to such public writings as are not judicial. In treating of this part of the subject, it is proper to mention some of the principal documents of this description; and then to proceed to the enquiry, how a party, who wishes to use public writings in evidence, may obtain an inspection.

The most ancient public document in the kingdom is Domesday-book, consisting of two volumes, kept in the receipt of the Exchequer. They contain a general survey of all the counties in England, excepting the four northern, and were compiled soon after the Conquest, for the purpose of ascertaining the ancient demesne lands, which were the soccage tenures first in the hands of Edward the Confessor, and afterwards of William the Conqueror. This has been always considered a book of the greatest authority; and if a question should at any time arise, whether a manor is ancient demesne, the trial is by inspection of Domesday-book. (1) These volumes have of late years been printed at the expense of government, in consequence of an address from the House of Lords; and the work is said to be executed with the most scrupulous fidelity and correctness. (2) Another ancient survey, which ascertains the extent of the king's ports, is also deposited in the Exchequer. (3) These surveys are recognised and treated as authentic documents in courts of justice, having been made by the authority and order of the Domesday-book.

(1) Hob. 188. Gilb. Ev. 69.
(2) First Report of House of Commons on Public Records, Appendix, A. 1, *a*.
(3) Gilb. Ev. 69.

Surveys.

government of the country on public occasions, and on subjects of public interest.

Surveys of ecclesiastical benefices. Pope Nicholas, A. D. 1291.

The Valor Beneficiorum, or pope Nicholas's Taxation, is another document of a public nature. In the year 1288, Pope Nicholas the Fourth, to whose predecessors in the see of Rome the first-fruits and tenths of all ecclesiastical benefices had for a long time been paid, granted the tenths to King Edward the First for six years, towards defraying the expense of an expedition to the Holy land; and, that they might be collected to their full value, a taxation by the king's precept was begun in that year, and finished for the province of Canterbury in the year 1291, or the 20th year of the reign of Edward the First; and for that of York in the following year; the whole being under the direction of the Bishops of Winton and Lincoln. (1) This taxation of Pope Nicholas is an important document, because all the taxes, as well as those paid to our kings as those to the Pope, were regulated by it, till the survey made in the twenty-sixth year of Henry the Eighth; and because the statutes of colleges, which were founded before the Reformation, are also interpreted by this criterion, according to which their benefices under a certain value are exempted from the restriction in the statute of the twenty-first of Henry the Eighth concerning pluralities. (2) The taxation is evidence of the rate and value, at which the persons, employed in that taxation, thought fit at that time to estimate the living. (3) The original is kept in the office of the king's remembrancer in the Exchequer.

26 H. 8. Valor beneficiorum.

A new Valor Beneficiorum was instituted in the twenty-sixth year of Henry the Eighth, when the first-fruits and tenths of every ecclesiastical promotion were annexed to the revenue of the crown. (4) To ascertain their value, ecclesiastical surveys were taken, by virtue of commissions in the king's name issuing under the great seal; (5) and these surveys are admitted as evidence of their amount at that period, although they are gene-

(1) See first Report of House of Commons on Public Records, p. 15.
(2) Humphreys v. Knight, Cro. Car. 455. 2 Lutw. 1305. Stump v. Ayliffe, 2 Gwill. 536.
(3) By Lord Redesdale, Bullen v. Michel, 2 Price, 477.
(4) St. 26 H. 8, c. 3.
(5) Sect. 3 & 10.

rally considered as estimating the value much too low. (5) It is to be observed, that the Valor Beneficiorum of the reign of Henry the Eight in no instance mentions the existence of a modus. The commissioners appear not to have taken notice of any existing modus, or immemorial agreement between the parson and the occupiers; but to have calculated the value of the first-fruits and tenths, without considering the question of modus, or any other legal exemption. Surveys.

Surveys of the possessions of religious houses, previous to the dissolution of the monasteries, are admissible in evidence, upon the same principle; and, in the case referred to, were admitted, to show what tithes belonged to the rector, and what to the vicar. (2) These surveys are admissible, although the commissions, under which they were taken, are not to be found. (3)

Surveys of the church and crown lands were taken by commissioners in the time of the Commonwealth, under the authority of acts or ordinances of the parliament; and copies of these surveys were deposited in many of the cathedrals. The originals would have been good evidence of the particulars of the surveyed estates, upon the same principle as the other public surveys which have been before mentioned; but as they were destroyed at the time of the great fire in London, the copies have been admitted, as evidence, in the place of the original surveys, provided they have been kept in unsuspected repositories. (4) The parliamentary surveys have the credit of being taken with extreme accuracy and minuteness. The circumstances, therefore, of these surveys being silent as to a supposed modus, has been considered to be strong evidence against its existence. (5) Parliamentary.

The history of the *Inquisitiones Nonarum* is thus given in the Report of the Commissioners of Public Records, before referred Inquisitiones Nonarum.

(1) 3 Gwill. 856, 1240. 4 Price, 221. 5 Price, 377. 2 Price, 435

(2) Vicar of Kellington v. Trin. Col. Cambridge, 1 Wils. 170.

(3) 1 Wils 170. Bagshaw v. Bishop of Bangor, cited in Underhill v. Durham, 2 Gwill. 542.

(4) Underhill v. Durham, 2 Gwill. 542. Green v. Proude, 1 Mod. 117. Bullen v. Michel, 4 Dow. 325. 2 Price, 399, S. C.

(5) 11 East, 284 1 Maule & Selw. 294.

Surveys.

to. (1) A grant having been made by parliament to Edward the Third, in the fourteenth year of his reign, of the ninth lamb, ninth fleece, and ninth sheaf, assessors and venditors were thereupon appointed, and directed, by three commissions under the great seal, for every county in England, to assess and sell these ninths. The *Inquisitiones Nonarum* were taken under the third commission, whereby the commissioners were directed to levy the ninth of corn, wool, and lambs, in every parish, according to the value upon which churches were taxed, (this means Pope Nicholas's taxation,) if the value of the ninth amounted to as much as the tax; but should the value of the ninth be less than the tax, they were directed to lay only the true value of the ninth, and to disregard the tax; and to gain correct information of these facts, they were directed to take inquisition upon the oath of the parishioners, in every parish. These inquisitions form the records called the *Inquisitiones Nonarum*.

Journals of parliament.

The Journals of the Lords or Commons are evidence of their proceedings.(*i*) An entry in the Journals of the House of Lords, stating, that a judgment below has been reversed, is evidence of the fact of reversal; (2) and the Journals have been admitted to prove an address from the House of Lords to the King, and the answer of the King.(3) Thus, the address of the Lords to the King, and the King's answer, proved by the Journals, have been admitted as evidence of an averment in an information, that certain differences had existed between the King of England and the King of Spain. (4) Here, it is to be observed, the fact related purely to a matter of state, and therefore admitted of this kind of proof. But a resolution of either House is not evidence of the truth of facts there affirmed; and therefore in the case of Titus Oates, who was charged with having committed perjury on the trial of persons suspected of the popish plot, a resolution in the Journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact. (5) An entry in the Journals may be proved

(1) Appendix, (L. 2,) p. 146.
(2) Jones v. Randal, Cowp. 17.
(3) Franklin's case, 9 St. Tr. 259, cited by Buller, J. 5 T. R. 445. And see the case of the Seven Bishops, 4 St. Tr. 39.
(4) See note (3,) supra.
(5) 4 St. Tr. 39.

(*i*) See Note 779, p. 1145.

by an examined copy compared with the original; but cannot be proved by the printed Journals. (1) Gazettes.

The public acts of government, and acts by the king in his political capacity, are commonly announced in the Gazette, published by the authority of the Crown; and of such acts announced to the public in the Gazette, the Gazette is admitted in courts of justice to be good evidence. A proclamation for reprisals, published in the Gazette, is evidence of an existing war.* Proclamations for a public peace, or for the performance of quarantine, and any acts done by or to the king in his regal character, may be proved in this manner; (2) and upon the same principle, articles of war purporting to be printed by the king's printer, are allowed to be evidence of such articles. (3) A Gazette, in which it was stated, that certain addresses had been presented to the King, has been adjudged to be proper evidence, to prove an averment of that fact in an information for a libel; (4) for they are addresses, said Lord Kenyon, of different bodies of the King's subjects, received by the King in his public capacity, and they thus become acts of state. And in the late case of the King v. Sutton, (5) the Court of King's Bench determined, that the King's proclamation, (which recited, that it had been represented, that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders,) was Gazettes. Proclamation.

(1) Lord Melville's case, 29 Howell's St. Tr. 683.

(2) 5 T. R. 436, 443. Quelch's case, 8 St. Tr. 212. Dupays v. Shepherd, Rep. temp. Holt, 296. Attorney General v Theakstone, 8 Price, 89; General Picton's case, 30 Howell's St. Tr. 493; in which case the articles of capitulation, for the surrender of an island, were proved by the Gazette.

(3) R. v. Withers, cited by Buller, J., 5 T. R. 446. See stat. 55 G. 3, c. 108, s. 36.

(4) R. v. Holt, 5 T. R. 436.

(5) 4 Maule & Selw. 546.

* Public notoriety is sufficient evidence of the existence of a war. Foster, Disc. ch. 2, s. 12, p. 219. 11 Vesey, 292. Evidence, therefore, was not produced to prove this fact, though averred in the indictment, in the cases of Sir John Friend and Sir W. Parkyn, in Cook's case, and Vaughan's case, which are reported in the State Trials. A declaration of war by a foreign government, transmitted to this country by the English ambassador, and produced from the Secretary of State's office, has been admitted as evidence of the commencement of hostilities between that government and another state. Thellusson v. Cosling, 4 Esp. N. P. C. 266. Case of Eliza Ann and others, 1 Dodson, Adm. Rep. 244.

Parish registers.

admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrages of that particular description had been committed in those parts of the country.

Gazettes are not evidence of private titles or private interests, as of a presentation, or of a grant by the King to an individual, which have no reference to the affairs of government; nor is a Gazette evidence to prove an appointment to a commission in the army. (1)

Notice of bankruptcy.

Notices relating to bankruptcies are constantly inserted in the Gazette; and they are made sufficient by act of parliament. Notices, also, of the dissolution of partnerships, are very commonly inserted. An advertisement in the Gazette, announcing a dissolution, has been admitted as evidence of a public notification of that fact; but such evidence is of little avail, unless it be shown, that the party, entitled to notice, was in the habit of reading the Gazette. (2) And such an advertisement in a common newspaper is not even admissible, without proof that the party took in that paper. (3) If the paper, containing the advertisement, is proved to have been read by the party, or if it is proved only to have been delivered in the usual course at the house of the party, the jury may reasonably be instructed to consider, whether the attention of a tradesman, in reading a newspaper, was not likely to be attracted by notices of the dissolution of partnerships, to which the attention of others might not be directed; and it is a question for the jury to determine, whether, under all the circumstances of the case, the party had actually received notice of the dissolution. (4) (*j*)

Parish registers.

Parish registers are evidence of births, marriages, and burials. Registers are directed to be kept as public books, and are accompanied with all the means of authenticity. "They are in

(1) Kirwan v. Cockburn, 5 Esp. N. P. C. 233. R v. Gardner, 2 Campb. 513.

(2) Leeson v. Holt, 1 Stark. N. P. C. 186. Godfrey v. Macauley, Peake, N. P. C. 155. 1 Esp. N. P. C. 371, S. C. Newsome v. Coles, 2 Campb. 619. See also Graham v. Hope, Peake, N. P. C. 154. Gorham v. Thompson, Peake, N. P. C. 42.

(3) 1 Starkie, N. P. C. 136.

(4) Jenkins v. Blizard and another, 1 Starkie, N. P. C. 420.

(*j*) See Note 780, p. 1145.

the nature of records," said Lord Mansfield, "and need not be produced, or proved by subscribing witnesses." (1) To prove a marriage, for instance, an examined copy of an entry is sufficient; this is proof of a marriage at a certain time, between two parties describing themselves by the names and places of abode there mentioned. Parish registers.

The keeping of registries for entries of births and christenings commenced in the thirtieth year of the reign of Henry the Eighth, and was afterwards enforced by injunctions from Edward the Sixth and from Queen Elizabeth. (2) Registers also for the recording of burials and weddings were directed to be regularly kept, by one of the canons of the church. (3) But the fullest directions are given by the marriage-act; (4) which, after requiring registers to be kept as public books in every parish, for the purpose of registering marriages, enacts, that "immediately after the celebration of every marriage, an entry thereof shall be made in such register, in which entry or register it shall be expressed, that the marriage was celebrated by banns or licence; and if both, or either of the parties married by licence be under age, with consent of the parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition; and also by the parties married, and attested by two credible witnesses." How kept.

By the canons of 1603, copies of parish registers in every diocese ought to be regularly transmitted once in every year to the diocesan or his chancellor; (5) a regulation extremely important, for the purpose of guarding the evidences of title and pedigree, but which has been so generally neglected as to make it necessary for the legislature to interpose, and pass an act for their better preservation. It is by this statute enacted, (6) that copies of the register books, verified by the officiating minister of the parish, shall be transmitted annually Copies registered.

(1) Birt v. Barlow, 1 Doug. 173. A book, entitled The Parish Register, produced from a chest in the vicarage house, and containing ancient entries respecting tithes due to the vicar, one of which entries purported to be made about 150 years ago by the vicar of that time, was admitted in evidence on a question of tithes between a succeeding vicar and occupiers of the parish, in the case of Drake v. Smyth and others, before the Lord Chief Baron. 5 Price, 369, 372, 377.

(2) 3 Burn. Eccl. L. 275. Gilb. Ev. 68.

(3) Can. 70. 3 Burn. loc. cit.

(4) St. 26 G. 2, c. 33, s. 14.

(5) Can. 70. Gibson's Codex, p. 204

(6) Stat. 52 G. 3, c. 146, s. 7.

Parish registers.

by the churchwardens, after they or one of them shall have signed the same, to the registrars of the diocese within which the church is situated. (*k*)

Effect of.

An entry of marriage in the parish register, made in the form prescribed by the act of parliament, is evidence that the persons therein named were married, on the day specified, by banns or licence, as the case may be. Such an entry is not essential to the validity of a marriage; so that, if it has been expressed in the regular form, the only consequence will be, that it cannot be admitted as evidence of the marriage, which must, therefore, be established by some other medium of proof.

Bigamy.

In a prosecution for bigamy, it will not be indispensably necessary to prove the registration of either marriage: it is sufficient to prove the fact of marriage by a person present at the time. (1) (*l*)

Identity of party.

In order to prove that the parties described in the register, are the same parties whose marriage is in question, it must obviously be unnecessary to call either of the subscribing witnesses to the register; any evidence which satisfies the jury concerning their identity, will be sufficient; as, by proof of the similarity of their hand-writing, or that the bell-ringers were paid by them for ringing after the marriage, or by proof of other circumstances to ascertain the persons. (2) (*m*)

Register of christenings.

An entry in a register of christenings, stating the year of the birth, is not evidence in support of a plea of infancy: (3) and the mere entry of christening, unaccompanied by any evidence showing that the person was young at the time of christening, does not prove the fact of birth in the parish. (4) (*n*)

Books not cognized.

A book of Fleet marriages cannot be read as a register, not having been compiled under public authority, and is not legal

(1) R. v. Allison, Russ. & Ry. Cr. C. 109.
(2) Bull. N. P. 27.
(3) Wilhen v. Law, 3 Stark. N. P. C. 63.
(4) R. v. North Petherton, 5 Barn. & Cress. 508.

(*k*) See Note 781, p. 1147. (*l*) See Note 782, p. 1147. (*m*) See Note 783, p. 1149. (*n*) See Note 784, p. 1149.

evidence of a marriage. (1)(*o*) A copy of a register of baptism, kept in the island of Guernsey, is not admissible in our courts of law; (2) nor is the copy of a register of a foreign chapel admitted here as proof of a marriage abroad. (3)(*p*) Ship register.

Public registers are required by act of parliament to be kept for the registering of ships; (4) and the register and certificate of registrer are conclusive evidence of want of title, against those who are not named in the register. Thus, in an action on a policy of insurance on freight, where the interest in a ship and its earnings were alleged to be in four persons, who were partners in trade, two only of whom were named as owners in the register, in was decided, that the action could not be maintained, although it was proved as a fact, that the ship had been paid for by all the four partners: for as the plaintiffs claimed the freight only in right of ownership, they could not recover without proving that right; and it appeared conclusively from the register, that all the four partners had not a legal title to the ship. (5) Registers of ships. Effect as to persons not named.

The register of a ship, then, is conclusive evidence, that persons, who are not there named as owners, cannot legally be joint owners; but the converse of the rule is not true, namely, that all persons who are named as owners in the register, are liable as such. Such registers are not recognized as public documents, to prove the ownership; and they are not evidence to fix the parties therein named as owners, in actions against them, unless they are shown to have been made by their assent or recognized by them. This point was decided in the case of Tinkler v. Walpole; (6) which was an action for goods sold Not evidence of ownership, per se.

(1) Reed v. Passer, Peake, N. P. C. 231. Lloyd v. Passingham, 1 Cooper, Ch. C. 155.

(2) Huet v. Le Mesurier, 1 Cox. Cas. 275. Whitehead v Wynne, 1 Jac. & Walk. 483.

(3) Leader v. Barry, 1 Esp. N P C. 333.

(4) St. 26 G. 3, c 65. St 34 G 3, c. 68. The reader is referred, on this subject to Lord Tenterden's Treatise on shipping, ch. 2, p. 27.

(5) Camden v. Anderson, 5 T. R. 709. 14 East, 229. Marsh v. Robinson, 4 Esp. 98.

(6) 14 East, 226. Cooper v. South and others, 4 Taunt. 802. Smith v. Fuge, 3 Campb. 456. Fraser v. Hopkins, 2 Taunt. 5. 2 Campb. 170, S. C. Teed v. Martin, 4 Campb. 90. Upon the same principle, an entry in books, kept in the office for licensing stage-coaches, is not any proof, that persons, named in the licence, are owners of a coach. Strother v. Willan, 4 Campb. 24. See also Ellis v. Watson, 2 Starkie, N. P. C. 453, 478.

(*o*) See Note 785, p. 1149. (*p*) See Note 786, p. 1149.

Ship register.

and delivered for the use of a ship, against the defendant as one of the owners. At the trial of the cause, in order to prove the ownership of the defendant, two registers were offered in evidence, purporting to have been made on the oaths of the managing owner, who gave the order for the goods, and of two other part-owners, swearing that they and others named, including the defendant, were owners of the ship; and it was insisted that these registers on account of their authenticity as public documents, required for public purposes, and obtained under the sanction of an oath, ought to be considered at least *prima facie* evidence to prove the defendant a part-owner. But Lord Ellenborough, C. J., who tried the cause, ruled that the evidence was not admissible, unless it could be shown that the defendant had assented to the register, or at least had recognized it. And this opinion was afterwards confirmed by the other Judges of the court.

Upon the same principle, a register is not of itself evidence of a joint ownership, in support of the defendant's plea, that other persons, there named, are jointly liable with him; (1) nor is it evidence, that the ship is British-built, as there described.(2) So, in an action brought by the plaintiff as agent, on a policy of insurance, the register is not evidence to prove an averment, that the interest in the ship is in the persons there described. (3) The legislature has made the registration necessary to complete a title, but this does not make it of itself proof of the title. Property in a ship may be proved now, as it was proved before the acts of parliament relating to registers; as, for example, by proof of acts of ownership, or by proving actual possession in the party, or in those to whom he has committed it, or in those from whom he has himself derived his title. Any one of these media of proof is sufficient *prima facie* evidence of ownership, without the aid of documentary proof or of title-deeds. (4)

Proof of property in ships.

(1) Flower v. Young. 3 Campb. 240.
(2) Reusse v. Meyers, 3 Campb. 475.
(3) Pirie v. Anderson, 4 Taunt. 652.
(4) 4 Taunt. 657. Robertson v. French, 4 East, 136. Hubbard v. Johnston, 3 Taunt. 177, 203. Amery v. Rogers, 1 Esp. N. P. C. 207. Thomas v. Foyle, 5 Esp. N. P. C 88

(*q*) See Note 787, p. 1151.

Books in public offices.

Rate-books.

It is enacted by st. 17 G. 2, c. 38, s. 14, that true copies of all rates and assessments, made for the relief of the poor be entered in a book to be provided for that purpose by the church-wardens and overseers of the poor of every parish, &c. who shall take care, that such copies be entered accordingly within fourteen days after all appeals from such rates are determined, and shall attest the same by putting their names thereto; and every such book shall be carefully preserved by the church-wardens, &c., for the time being or one of them, in some public place, in every such parish, &c., whereunto all persons assessed or liable to be assessed may freely resort, and shall be delivered over from time to time to the new and succeeding church-wardens, &c., as soon as they enter into their offices, and shall be produced by them at the general or quarter sessions, when any appeal is to be heard or determined.

Book for parish indentures.

The stat. 42 G. 3, c. 46, enacts, that the overseers of the poor of every parish shall provide and keep a book at the expense of the parish, and enter therein the name of every child, who shall be bound out by them respectively as an apprentice, together with the several other particulars, in the manner and form required by this act; and every such entry shall be produced and laid before the two justices of the peace, who shall signify their assent to the indenture of apprenticeship, at the time when such indenture shall be laid before them for that purpose, and each entry shall, if approved of, be signed by them according to the prescribed form. And in the third section, it is enacted, that any person may at all seasonable hours inspect such book in the hands of the said overseer, and take a copy of such entry; and every such book shall be deemed to be sufficient evidence in all courts of law in proof of the existence of such indentures, and also of the several particulars specified in the register respecting such indentures, in case it shall be proved, to the satisfaction of the Court, that the indentures are lost or destroyed.

Books in public offices, &c.

The register of the Navy-office has been admitted in evidence to prove the death of a sailor; (1) the book from the master's

(1) Bull. N. P. 249. Rhode's case, 5 Esp. N. P. C. 117. See Barber v. 1 Leach, Cr. C. 29 Wallace v. Cook, Holmes, 3 Esp. N. P. C. 190.

Books in public offices.

office in the Court of King's Bench, to prove a person one of the attornies of that court; (1) and the log-book of a man of war, which convoyed a fleet, to prove the time of the convoy's sailing. (2)(*r*) Bank-books are good evidence to prove the transfer of stock.(3)(*s*)

Vestry-book,

On a prosecution for a libel published concerning a person in his office of treasurer of a parish, an entry in a vestry-book, stating, that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence, to support an allegation in the indictment, that he was duly elected treasurer. (4) (*t*) So, in an action for disturbing the use of a pew in a church, an old entry in the vestry-book, stating that the pew had been repaired by the then owner of a messuage, (under whom the plaintiff claimed,) has been admitted as evidence of his right; being made by the church-wardens on a subject within the scope of their official authority, and as showing the reputation in the parish respecting the right.(5)

Prison-book.

The day-book of a public prison containing a narrative of the transactions of the prison, has been received upon the same principle, as proof of the time of the prisoner's commitment or discharge: (6) but it would not be admissible to prove the cause of his commitment. (7) The distinction between these cases is, that in the former there was no document besides the one produced, and no other evidence of the fact in question could be given, except perhaps the parol testimony of some person, who might have happened to be in prison at the time; but in the last case, the *committitur*, from which the entry was inserted in the book, might have been produced, and that would have been better evidence of the cause of commitment.(*u*)

Book at Lloyd's.

An entry in the book kept at Lloyd's, stating the capture of a ship, is evidence of that fact; but such entry is not a sufficient

(1) R. v. Crossley, 2 Esp. N. P. C. 524.
(2) D'Israeli v. Jowet, 1 Esp. N. P. C. 427.
(3) Breton v. Cope, Peake, N. P. C. 30. Marsh v. Colnet, 2 Esp. N. P. C. 665.
(4) R. v. Martin, 2 Campb. 100.
(5) Price v. Littlewood, 3 Campb. 288.
(6) R. v. Aicles, 1 Leach, Cr. C. 436.
(7) Salte and others v. Thomas, 3 Bos. & Pull. 188.

(*r*) See Note 788, p. 1152. (*s*) See Note 789, p. 1153. (*t*) See Note 790, p. 1154. (*u*) See Note 791, p. 1154.

Books in Public offices.

notice of the capture to the defendant, so as to make him liable on a policy of insurance, by which it was agreed, that the loss should be adjusted, within a certain time after advice of the capture. (1)(*v*)

Poll Book.

The poll-books taken at an election for members of parliament, or at the election of a mayor, are admissible in evidence. (2)(*w*)

Official returns.

A copy of an official document, containing an account of the cargo of a ship, made in pursuance of an act of parliament by an officer of the customs, and lodged there as an official document, has been admitted as proof, that the property, therein mentioned, was put on board: (3) and a copy of an official document, containing the names, capacities, and descriptions of passengers on board a vessel, made in pursuance of an act of parliament, is good proof of such persons being on board. (4)(*x*)

Office of bankrupts.

A book in the office of secretary of bankrupts, containing entries of the allowance of certificates, kept by order of the Chancellor, and recognized by him as an official document, would be good secondary evidence of the allowance of a certificate; but a book, containing such entries, is not admissible, if it appear to be kept merely as the private memorandum of the clerks, without any authority or sanction from the Chancellor. (5)

Excise-book.

Books transcribed by officers of excise from specimen papers, which hang up in every malthouse, and regularly returned to the excise-office, are admissible evidence against a maltster, though not signed by him, and though the excise-officers are not called to substantiate the books of proof. (6)

Auditor's book.

A book, in which leases were enrolled, and which was kept in the office of the auditor of the Bishop of Durham, has been held to be admissible evidence of a lease, after proof of the loss of the original and the counterpart; in the case alluded to it appeared, that the office was conducted like a public office, and

(1) Abel v. Potts, 3 Esp. N. P. C. 242.
(2) Mead v. Robinson, Willes, 424. R. v. Hughes, cited, ib.
(3) Johnson v. Ward, 6 Esp. N. P. C. 47. The official paper was proved to have gone with the ship.
(4) Richardson v. Mellish, 1 Ry. & Mo. 68. 2 Bing. 229, S. C.
(5) Henry v. Leigh, 3 Campb. 499.
(6) R. v. Grimwood, 1 Price, 371.

(*v*) See Note 792, p. 1154. (*w*) See Note 793, p. 1124. (*x*) See Note 794, p. 1155.

Books in public offices.

the officer appointed by patent, and that the practice had been to enrol leases; the enrolment-book was therefore considered as a public instrument, and presumed to exhibit a correct copy. (1)(*y*)

Clerk of peace

Books preserved in the office of clerk of the peace, containing enrolments of ancient deputations of gamekeepers for a certain manor, are admissible in evidence, to show that those persons, who caused the enrolments to be made had exercised rights as lords of the manor; and they are admissible, without proof that the original deputations have been lost, or that the gamekeepers, named in them, have acted under their authority. (2)(*z*)

Authenticity of book.

In the above cited case of the King v. Aickles, (3) the clerk of the papers of the prison produced a daily book, kept by him, containing entries of the names of all the debtors and criminals brought into prison, and of the times when they were discharged;

Prison-book.

but it appeared that these entries were not made by the clerk on his own knowledge of the facts, but generally from the information of the turnkeys, and frequently from the turnkey's indorsements on the backs of the warrants, which warrants were afterwards regularly filed. Upon this, it was objected, that the entries in the books were mere copies, and that the original minutes, from which the entry of the prisoner's discharge had been made, ought to be produced as the best evidence. But the Court overruled the objection, and admitted the contents of the book, as it appeared to have been the constant and established practice of the keepers of public prisons to register the discharge of prisoners in such books as the one produced, and in the manner there described. (*a*)

Parish-book.

In another case, a parish-register of christenings was received in evidence as an original authentic book, although the constant practice in the parish was to make a memorandum of the christenings in a day-book from which entries were some time afterwards made into the register. (4) The question in that case was on the plaintiff's legitimacy, and on the part of the plaintiff a

(1) Humble v. Hunt, Holt, N. P. C. 601.
(2) Hunt v. Andrews, 3 Barn. & Ald. 348.
(3) Leach, Cr. C. 436.
(4) May v. May, 2 Str. 1072. Lee v. Meecock, 5 Esp. N. P. C. 177. See Hughes v. Wilson, 1 Starkie, N. P. C. 179.

(*y*) See Note 795, p. 1155. (*z*) See Note 796, p. 1155. (*a*) See Note 797, p. 1155.

general parish register was produced, in which there was an entry of his christening, describing him in the same manner as legitimate children were usually entered. It appeared, that the practice was to make the entries in this register once in three weeks out of a day-book, in which entries were made immediately after the christening, or on the same morning; and in the case of illegitimate children, to insert in the entry in the day-book the letters B. B., which were intended to signify "base born." The counsel for the defendant then offered in evidence the day-book, from which the other entry was posted, and in which the letters B. B. were inserted, insisting that it was the original entry. But a majority of the Judges, present on a trial at bar, were of opinion, that such evidence ought not to be received, on the ground, that there could not be two registers in the parish, and that the one first produced ought to be taken to be the true register.—If, indeed, the entry in the day-book, representing the plaintiff as illegitimate, had been signed by the reputed father or the mother, or made under their direction, such evidence would have been admissible, as the declaration of a deceased parent on a question of legitimacy: but if, on the other hand, in the absence of such proof, the entry appeared to be merely a private memorandum, kept for the purpose of assisting the clerk to make up the register, (and of that nature it seems here to have been considered,) in that case it could not be received as the original authenticated entry. (*b*)

Rolls of manor courts.

The rolls of a court baron (which is the court of the freeholders,) or of the customary court (which is the copyholder's court,) are evidence between the lord of the manor and his copyholders or tenants. They are the public documents, by which the inheritance of every tenant is preserved, and the records of the manor court, which was anciently a court of justice relating to all property within the manor. (1) Ancient writings, though not properly court rolls, but found among the court rolls, and delivered down from steward to steward, purporting to be made "*assensu omnium tenentium*," have been admitted as evidence to prove the course of descent within a manor: and this, although they were not signed by any of the tenants. (2) An entry in

Rolls of manor courts.

Ancient writings.

(1) Gilb. Ev. 67. 4 T. R. 670.

(2) Denn, dem. Goodwin v. Spray, 1 T. R. 466, 473.

(*b*) See Note 798, p. 1156.

Rolls of manor courts.

Customary descent.

the court rolls, stating the several customs within the manor as found by the homage, and regulating the descent of the several species of tenure, was in another case admitted to be good evidence of the mode of descent, although no instances were shown of any tenant having in fact so taken under the custom: (1) this entry, recording the solemn opinion of twenty-four homagers, who are the constitutional Judges of the court, delivered on an occasion when they were discussing the interests of all the tenants of the manor, was admitted as full proof of the tradition respecting the custom of descent in the manor; which tradition and received opinion are the *lex loci.* And entries, on the court rolls, of admissions of tenants to customary estates, stating the admission to be on the determination of the estate of the last tenant's widow, "who held it during her chaste viduity according to the manor," are evidence of a tenure on that condition, although no instance of forfeiture for such a cause has occurred. (2) In the absence of such instances, the custom must be decided by evidence of the form of admissions only. Those that were made *durante casta viduitate*, if uncontradicted, would be evidence that such was the condition, on which the estates in the manor were originally granted; and those that are not necessarily contradicted by the entries of admissions, generally, *durante viduitate;* for they might be understood of a viduity according to the custom, which the other entries would show to be a *chaste viduity.* (3) (c)

Customary estates.

Ancient writing.

Upon the same principle, in an action by a copyholder against a freeholder of a manor for surcharging the common, an old writing found among the muniments of the manor, and purporting to be signed by many of the copyholders, stating that the commoners of the manor had an ancient unlimited right of common, but that they had agreed to a certain stint, was held admissible evidence of the reputation of the manor at that time, as to the general prescriptive right of common, against the limited right insisted on by the plaintiff; and although it was not proved, that the instrument had been signed by a majority of the copyholders, or that the plaintiff held the copyhold tene-

(1) Roe, dem. Beebee v. Parker, 5 T. R. 26. Roe, dem. Bennett v. Jeffery, 2 Maule & Selw. 92.

(2) Doe, dem. Askew v. Askew, 10 East, 520

(3) By Ld. Ellenborough, 10 East, 522

(c) See Note 799, p. 1156.

ments under any one of those who had signed, yet that circumstance could not affect the admissibility of the instrument, which was offered in evidence, not on the footing of an agreement, but as evidence of tradition and the received opinion within the manor. (1) Terriers.

Terriers are of two kinds, temporal and ecclesiastical. It has been established by a variety of cases, that old terriers or surveys of a manor, are evidence of manorial tenures or boundaries. (2) And an ecclesiastical terrier is evidence of the possessions of a church, if it has been regularly made and preserved in the proper repository. Ecclesiastical terriers are constantly received in questions of tithes: they are ecclesiastical records, made in *perpetuam rei memoriam*, and are as solemn instruments as any that can be produced on such subjects. (3) Terriers.

By the ecclesiastical canons, an inquiry is directed to be made, from time to time, of the temporal rights of the clergyman in every parish, and to be returned into the registry of the bishop. This return, which is generally signed by the minister, is denominated a terrier, and derives its authority from being found either in the bishops register office,(4) or the registry of the archdeacon of the diocese. (5) Unless it comes from one of these repositories, it cannot, in general, be admitted in evidence. A paper, therefore, purporting to be a terrier, found in the charter-chest of a college, which had property in the parish, was thought to be inadmissible to disprove a modus. (6) Custody of.

However, under particular circumstances, this rule respecting the custody of the terriers has been relaxed, and a terrier has been admitted, though not brought from one of the regular repositories, when the custody in another place has been satisfactorily explained. One that was found in the registry of the dean and chapter of Litchfield, has been admitted in evidence against a prebendary. (7) This evidence was rejected at the

(1) Chapman v. Cowlan, 13 East, 10.
(2) Gilb. Ev. 69.
(3) 5 Price, 380, 383.
(4) Atkins v. Hatton, 4 Gwill. 1406. 2 Anstr. 386, S. C. 4 Gwill. 1593.
(5) Potts v. Durant, 4 Gwill. 1450, 1454. 3 Anstr. 789, S. C. See Drake v. Smyth, ante, p. 409. (1)
(6) 4 Gwill. 1406.
(7) Miller v Foster, 4 Gwill. 1406, n., and see Bullen v. Michel, stated in ch. 8, s. 2, infra.

Terriers.

trial; but a new trial was afterwards granted by the Court of King's Bench, on the ground, that the evidence ought to have been received, as there appeared to be a proper connection between the terriers and the place where it was found; and a strong corroborating circumstance was, that the terrier was found annexed to an old lease of the prebend, of nearly the same date. (1)

Private custody.

But when the custody is merely private, and unconnected with the subject-matter, the courts have never gone the length of admitting such papers in evidence. An instrument, therefore, purporting to be an endowment, without the seal of the bishop, and another purporting to be an Inspeximus of the former under his seal, were rejected, because they came out of the hands of a private person entirely unconnected with the matters contained in them. (2)

Evidence against whom.

A terrier is strong evidence against a parson; but it is never admitted for him, unless it be signed by a church-warden, or, if the church-wardens are nominated by him, by some of the substantial inhabitants of the parish. (3) Old terriers signed by the rector, church-wardens, and other inhabitants of the parish, are evidence for a succeeding rector against the land-owners, on a question of farm-modus, although they are not proved to have been signed by occupiers of the farm, or by any person from whom the land-owners derive title. (4)

Signature.

Terriers are generally signed by the minister of the parish; but this does not appear to be essentially necessary. In a late case, (5) on a bill filed by a vicar against the impropriatrix of a rectory, for agistment tithe, a terrier was given in evidence, on the part of the vicar, signed only by the church-wardens: it was objected, first, that it was not a terrier, because made by the church-wardens alone, and not signed by the vicar; secondly, even supposing it to be a proper terrier, yet that it could not be admitted in evidence in that cause against the rector, as it was

(1) 4 Gwill. 1453.
(2) Potts v. Durant, 4 Gwill. 1450.
(3) Bull. N. P. 248. Earl v. Lewis, 4 Esp. N. P. C. 3.
(4) Mytton v Harris, 3 Price, 19. Wood, B. contra.
(5) Illingworth v. Leigh, 4 Gwill. 1615. Potts v. Durant, 3 Anstr. 796.

not signed by any person claiming under, or on the part of the rector. However, the court were of opinion that the terrier was admissible; that such imperfect terriers were now uniformly received; that the terrier in question was signed by persons who were in no respect interested, and whose duty it was, from their official situation, to sign it; and that the want of the vicar's signature made it stronger evidence in favour of his successor.

Heralds' books.

The ancient books of the heralds' office,(1) and their visitation-books of counties,(2) are evidence on a question of pedigree. The visitation-books contain the pedigrees and arms of the nobility of the kingdom from the twenty-first year of Henry VIII. to the latter end of the 17th century, during which period the two provincial kings of arms, soon after their investiture in office, usually received a commission under the great seal, authorizing them to visit the several counties within their respective provinces, "to take survey and view of all manner of arms, cognizances, crests, and other like devices, with the notes of the descents, pedigrees, and marriages of all the nobility and gentry therein contained; and also to reprove, control, and make infamous by proclamation, all such as unlawfully and without just authority usurp or take any name or title of honour or dignity." The first of these commissions was issued in the twenty-first year of Henry VIII., and the last in the second of James II. (3) From these visitation-books, entries were afterwards made into the books kept by the college of heralds.

Pope's bull.

A licence from the Pope, granted in the reign of Edward II., has been adjudged, in an old case, to be evidence of an impropriation, the pope being formerly the supreme head of the church, and having the disposition of all spiritual benefices.(4) For the same reason, a Pope's bull was formerly admitted in

(1) King dem. Lord Thanet v. Foster, 2 Jon. 224.
(2) Pitten v. Walter, 1 Str. 161. Matthews v. Port, Comb. 63.
(3) See First Report of the House of Commons on the Public Records, p. 82. Appendix, (c. 8.)
(4) Cope v. Bedford, Palm. 427.

evidence to show that monastery lands had a special exemption from the payment of tithes. (1)

Corporation books.

Corporation-books, containing an account of the privileges or public transactions of the body, are evidence in a suit between the several members, on the same footing as manor-books between the tenants of a manor. But they are not evidence, in favour of a corporation, to support a claim of right against a stranger;(2) as, where a right to certain tolls is claimed by a corporation, entries in the corporation-books, respecting payments made by individuals in former times, are not admissible, on the part of the corporation, against a party who contests the right to tolls;(3) for such entries relating to the private interests of the corporation, and being of a private nature, cannot be evidence for the party to whom the books belong. (*d*)

Tolls.

Public right.

On a question of *public right*, such as the right of swearing and admitting freemen, &c., corporation-books are admissible. (4) And on a question of *tithes* also, (in which the books of a former rector are, in some cases, admissible in evidence for the successor,) entries made in the books of an ecclesiastical corporation *aggregate* are admissible, if they would be properly admitted from the books of a *sole* ecclesiastical corporation. On such a subject the rule must be the same, whether the corporation consists of one or many. (5)

Tithes.

Custody of.

The books of a corporation cannot be admitted in any case, unless shown to have been regularly kept by the proper officer of the corporation. (*e*) On an information in the nature of a *quo warranto*, the prosecutor produced in evidence a book written by the prosecutor's clerk, not an officer of the corporation, which appeared to be only minutes of corporate acts done some years before, and was not kept as a public book of the corporation; this evidence was rejected at the trial, and, on a motion

(1) Lord Clanricard's case, Palm 37.

(2) 1 H. Black. 214, n. (c), Mayor of London v. Mayor of Lynn. In the case of the Mayor of Kingston-on-Hull v. Horner, Cowp 102, such evidence was received by consent: see 1 H. Bl. 214.

(3) Manlage v. Lawrence, 3 Barn. & Ald. 142. Another case to illustrate the same principle is R. v. Debenham, 2 Barn & Ald. 185.

(4) Case of Gibbon, upon a *quo warranto*, 17 Howell's St. Tr. 810, 854.

(5) Short v. Lee, 2 Jac & Walk. 470, 476, 479.

(*d*) See note 800, p. 1156. (*e*) See Note 801, p. 1159.

afterwards for a new trial, the Court held that it had been properly rejected. "Corporation-books," the Court said, "are generally allowed to be given in evidence, when they have been publicly kept as such, and when the entries have been made by the proper officer; not but that entries made by other persons may be good, if it be shown that the town-clerk is sick, or refuses to attend." (1)(*f*)

Histories.

"A general history may be admitted," says Mr. Justice Buller, "to prove a matter relating to the kingdom at large." (2) Thus, in the case of St. Katharine's Hospital, Lord Hale allowed Speed's Chronicles to be evidence of a particular point of history in the time of Edward III. (3) And the same book was admitted as evidence of the death of Edward the Second's queen, in the case of Lord Brounker v. Sir R. Atkins, (4) where Ch. J. Pemberton said he knew not what better proof they could have. Histories, however, it is admitted, cannot be received as proof of a private right or particular custom. (5) Camden's Britannia was therefore rejected on an issue, whether by the custom of Droitwich, salt-pits could be sunk in any part of the town, or only in a certain place. (6) And in another case, where the question was, whether a particular abbey was of the inferior order, Dugdale's Monasticon was refused, because the original records might be had in the augmentation office. (6) So, it has been determined, that Dugdale's Baronage is not evidence to prove a descent. (7)(*g*)

A question arose, on the impeachment of Warren Hastings, as to the competency of proving a national custom by a general history. The managers for the Commons wished to prove the customs in Hindostan, respecting the treatment of women of rank; and, for this purpose, proposed to read extracts from the History of the Growth and Decay of the Ottoman Empire, by

(1) R. v. Mothersell, 1 Str. 92. 12 Vin. Abr. Evidence, (A. b. 15.) pl. 16. 17 Howell's St. Tr. 854.
(2) Bull. N. P. 248.
(3) 1 Vent. 151. Stainer v. Burgesses of Droitwich, 1 Salk. 282. Skin. 623, S. C.
(4) Skin. 14.
(5) Bull. N. P. 248. Cockman v. Mather, 1 Barnardist. 14.
(6) 1 Salk. 282. Skin. 623.
(7) Piercey's case, 2 Jon. 164.

(*f*) See Note 802, p. 1159. (*g*) See Note 803, p. 1161.

Prince Demetrius Cantemir. (1) The counsel for the defendant objected, that it would be first necessary to lay some ground for the production of this evidence; at least, it should be shown, that the laws and customs of Constantinople were the same as those of Hindostan; and even then, they said, it might admit of considerable doubt, whether such a history could be admitted in evidence. After argument on the part of the managers of the Commons, the House of Lords informed them, that if the passage which it was proposed to produce from Cantemir's History, went to prove an universal custom of the Mahommedan religion, the managers might read it. Two extracts from the book were accordingly read. (*h*)

Proof of entry in public books.

With regard to the proof of entries in public books, it is now clearly settled, that wherever an original is of a public nature and admissible in evidence, and examined copy will equally be admitted. (2) (*i*) This rule is necessary, as well for the security of the document, as for the convenience of the public. Examined copies, therefore, of entries in the Journals of the Lords or Commons, (3) or of entries in the Council-book in the Secretary of State's office, (4) or of entries in the Bank books, (5) (*j*) or in the books of the East-India Company, (6) and examined copies of entries in parish registers, or in the books of assessments made by the commissioners of land tax, (7) or in the books of the commissioners of excise, (8) or in the court-rolls of a manor, (9) (*k*) or in poll-books of an election of a mayor or a member of parliament, (10) and examined copies in other cases of the

(1) Extract from a report of the proceedings, on the impeachment, in the possession of T. Jones Howell, Esq., the editor of the valuable new collection of State Trials, to whose kindness the author is indebted for the point above stated. The question occurred on the 22d of April, 1788. The point was referred to, by Lord Ellenborough, on the trial of General Picton. See 30 Howell's State Trials, p. 492.

(2) Holt C. J. in Lynch v. Clerke, 3 Salk. 153. R. v. Haines, Comberb. 337. Skin. 583, S. C.

(3) Jones v. Randal, Cowp. 17. R. v. Lord G. Gordon, 2 Doug. 593. The printed Journals are not evidence.

(4) Eyre v. Palsgrave, 2 Campb. 606.

(5) Marsh v. Colnet, 2 Esp. N. P. C. 665. Breton v. Coape, Peake, N. P. C. 30. Auriel v. Smith, 18 Ves. 198, 204.

(6) 2 Doug. 593, n. (3).

(7) R. v. Binn and others, 2 T. R. 234.

(8) Carth. 346. R. v. Commissioners of Land-tax, 2 T. R. 234.

(9) Tuckney v Flower, Comberb. 137. R. v. Haines, ib. 337, by Holt C. J. Doe. dem. Churchwardens of Croydon v. Cook, 5 Esp. N. P. C. 221. Doe, dem. Bennington v. Hall, 16 East, 208.

(10) Mead v. Robinson, Willes, 424.

(*h*) See Note 804, p. 1162. (*i*) See Note 805, p. 1165. (*j*) See Note 806, p. 1165. (*k*) See Note 807, p. 1166.

same kind have been admitted in evidence, when the original books themselves would have been admissible. But where an original is of a private nature, a copy will not be evidence, unless the original is lost, or destroyed, or in the possession of the opposite party. Thus, the copy of an old letter, brought from the chest of a corporation, has been refused. (1) In one case, indeed, where the original was kept in the Bodleian library at Oxford, and by the statutes of the University not removable, an examined copy was allowed to be given in evidence; (2) the Court admitted the case not to be within the general rules of evidence, but, under the particular circumstances, permitted the copy to be read. (*l*)

(1) R. v. Gwyn, 1 Str. 401.

(2) Downes v. Moreman, 2 Gwill. 659. Bunb. 189, S. C.

(*l*) See Note 808, p. 1166.

CHAP. VII.

Of the Inspection of Public Writings.

Records.

The judicial records of the king's courts are safely kept for the public convenience, that any subject may have access to them for his necessary use and benefit, which was the ancient law of England, and is so declared by an act of parliament in the forty-sixth year of Edward III. (1)

Copy of indictments.

Some restriction, however, of the general right of inspecting records has been thought necessary in the case of an acquittal on a prosecution for felony; in which case, if the trial is at the Old Bailey, a copy of the indictment cannot regularly be obtained without an order from the Court; and it is a common practice, on the circuits, to apply to the Court for a copy, at the time of the trial. This practice appears to have been first adopted at the Old Bailey, in pursuance of an order made by some of the Judges, for the regulation of those sessions, in

Order for.

(1) 3 Inst. 71. Pref. to 3d Rep. p. 3, 4. See Sir R. Grahame's Trial, 12 Howell's St. Tr. 659.

In case of felony.

the twenty-sixth year of Charles II. (1) It was then ordered, "that no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery: for the late frequency of actions against prosecutors, which cannot be without copies of the indictment, deterreth people from prosecuting for the king upon just occasions." And Lord Holt has laid it down as a general rule of law, that if a person be indicted for felony and acquitted, and means to bring an action (without sufficient cause,) the Judge will not permit him to have a copy of the record, and he cannot have a copy without leave. (2) (*m*) In the case of Vandercomb and Abbott, (3) the prisoners after their acquittal applied for copies of the several indictments, for the purpose of assisting them in their plea of *autrefois acquit:* the Court, however, refused to grant them copies, but ordered the officer to read over the indictments slowly and distinctly, which was accordingly done.

The rule of the Judges states, that an action against a prosecutor cannot be maintained without a copy of the indictment, and that a copy is not to be given without an order from the Court; but it is not to be inferred from this, that an order is essentially necessary for the introduction of a copy in evidence, or, if a copy were offered to be produced without an order, that it could on that account be properly rejected. The admissibility of such evidence has been determined in the case of Legatt v. Tollervey. (4) (*n*)

In case of misdemeanor.

The rule, which has been before mentioned, is confined to cases of felony. In prosecutions for misdemeanors, the defendant is still entitled to a copy of the record, as a matter of right, without a previous application to the Court. (5) So, in the case of a conviction by a magistrate, the defendant is entitled to a

(1) Directions for Justices at the Old Bailey, prefixed to Kelyng's Rep. p. 3. order 7. See Brangam's case, 1 Leach, Cr. C. 32. In this case, Willes, C. J., is reported to have said, that, by the laws of the realm, every prisoner, upon his acquittal, has an undoubted right and title to a copy of the record, for any use which he may think fit to make of it; and that, after a demand, the proper officer might be punished for refusing to make out a copy.

(2) In the case of Dr. Groenvelt v. Dr. Burwell and others, 1 Ld. Raym. 253.

(3) 2 Leach, Cr. C. 821.

(4) 14 East, 302.

(5) Morrison v. Kelly, 1 Black. Rep. 385. Evans v. Phillips, reported from MS. in Selw. Ni. Pri. 952.

(*m*) See Note 809, p. 1166. (*n*) See Note 810, p. 1167.

copy of the conviction, in order to defend himself against an action for the same offence; and if it should be refused, and the defendant in consequence sue out a writ of certiorari, merely for the purpose of procuring a copy and making his defence, the magistrate will be compelled to pay his own costs of returning the conviction. (1) The conviction may be drawn up at any time, before the return to the certiorari or to the sessions, though after a commitment, (2) or after the levying of the penalty (3). And the conviction returned to the sessions, or to the Court of King's Bench, is the only one, of which those courts will take judicial notice. (4)

Inspection of depositions.

A defendant on a criminal charge is not entitled to an inspection of the grounds, upon which the prosecution has been instituted. In some species of treason, indeed, the prisoner is entitled to a copy of the indictment, a privilege not allowed by the common law, but conferred by act of parliament; (*o*) but neither in cases of treason nor of felony has he any right to a copy of the depositions of witnesses, who are to appear against him.

When informations are filed by the Attorney-General, on depositions taken under the excise laws, the defendant is not allowed to inspect those depositions. And in a case where an information was filed against an officer of the East-India Company, on charges of delinquency founded upon the report of a board of enquiry in India, the Court of King's Bench were of opinion, that the defendant had no right to have an inspection of that report, and that the Court had no discretionary power to grant it. (5) "The practice on indictments at common law, and on information upon particular statutes," said Mr. Justice Buller on that occasion, "shows it to be clear, that the defendant is not intitled to inspect the evidence, on which the prosecution is founded, till the hour of trial."

Proceedings of inferior jurisdictions.

The right of inspecting the proceedings of inferior jurisdictions is more limited. It cannot be necessary for the in-

(1) R. v. Midlam, 3 Burr. 1721.
(2) Massey v. Johnson, 12 East, 67.
82. 16 East, 20.
(3) R. v. Barker, 1 East, 186.
(4) Ibid. 188.
(5) R. v. Holland, 4 T. R. 691.

(*o*) See Note 811, p. 1167.

terests of the public, that they should be open for inspection to all persons without distinction; but, on the other hand, it seems reasonable, that, in any suit, where the regularity of those proceedings may come into question, a party should have the power of taking a copy of such, as have been instituted against himself. In an action of trespass and false imprisonment, brought by the plaintiff, who had been sued in the Court of Conscience in London, the Court of King's Bench allowed the plaintiff to inspect the proceedings, so far as they related to the suit against himself, on the ground that every one has a right to look into the proceedings to which he is a party. (1) In another case, where the plaintiff, having been fined for neglect of duty, as an under-officer to the commissioners of lieutenancy for the city of London, brought an action of trespass against the defendant for distraining upon him, the Court granted the plaintiff a rule for inspecting and taking copies of the rates and assessments made by the commissioners. (2) On the same principle, in an action for a malicious prosecution and false imprisonment, the plaintiff may obtain a rule for a copy of the information, upon which he was committed; and, as the original itself ought to be produced at the time of the trial, the Court will also grant a rule, calling upon the committing magistrate to cause it to be produced. (3)(*p*)

Parish-registers, and other public books.

Parish-registers, books of the India Company relating to the transfer of stock, books of the Bank, &c., are for some purposes considered as public books; and persons interested in them have a right to inspect and take copies of such parts as relate to their interest. (4) So the books of the commissioners of the lottery, and their numerical lists, are of a public nature: and kept by the commissioners in trust for the ticket-holders, who are entitled to an inspection, by rule of court. (5)(*q*)

(1) Wilson v. Rogers, 2 Str. 1242.

(2) Edwards v. Vesey, Rep temp. Hard. 128.

(3) R. v. Smith, 1 Stra. 126. Welsh v. Richards, Barnes 468. S. P. Herbert v. Ashburner, 1 Wils. 297. Moody v. Thurston, 1 Stra. 304, and R. v. Commissioners of Land-tax, 2 T. R. 234. See Groenvelt v. Burwell, 1½ Ld. Raym. 253, 454. Carth. 421, 491, S. C. Avery v. Dickenson, Say. 250.

(4) Geery v. Hopkins, 2 Ld. Raym. 851. Warriner v. Giles, 2 Stra. 954. Mayor of London v. Swinland, 1 Barnardist. 454.

(5) Schinotti v. Bumstead and others, cited from a MS. case, in 2 Tidd's Prac. 596.

(*p*) See Note 812, p. 1167. (*q*) See Note 813, p. 1168.

Access is not allowed to such parish-books as are kept only for the private use of the parish and relate to their private interests. An inspection was, for that reason, refused, in an action of ejectment by an impropriator against the church-wardens of a parish, where a rule was applied for, on the part of the plaintiff, suggesting, that the parish-books would make the titles appear, and that they were the common books belonging to the parish at large: but the court were of opinion, that, when the person claims a distinct interest from that of the parish, it is not reasonable to compel the parish to discover their title by showing their books, which are kept only for their own use. (1) For the same reason, a public company will not be compelled to produce any books relating to their private transactions. (2)

Books of public office.

Nor will access be granted to the books of public offices, in collateral actions brought by persons who have no interest in the books; therefore, in a *qui tam* action for penalties against a clerk in the post-office, for interfering in the election of a member of parliament, the prosecutor was not allowed to have a rule for inspecting the books of the post-office, as the cause did not relate to any transaction in the post-office, for which transactions alone those books are kept. (3) Nor will the Court grant a rule for inspecting the custom-house books, for the purpose of furnishing evidence in an action between two persons, who have no interest in the subject matter, concerning the amount of a particular branch of the public revenue. (4)

Rolls of manor courts.

The court-rolls of a manor are kept in the custody of the lord or his steward, not for the use of the lord alone, but as the common evidence of the manorial rights, to which evidence all the tenants of the manor, whether copyhold or freehold, have an undoubted right of access, as well in actions between the

(1) Cox v. Copping, 5 Mod. 395. 1 Ld. Raym. 337. Lewis v. Baker, 1 Barnardist. 100. Turner v. Gethin, Vin. Ab. tit. Evidence, (F. b.) pl. 11. As to the inspection of the proceedings before commissioners of bankrupt, see vol. ii. p. 2.

(2) Shelling v. Farmer, 1 Stra. 646. Murray v. Thorhill, 2 Stra. 717.

(3) Crew q. t. v. Blackburn, cited 1 Wils. 240. 2 Stra. 1005, S. P.

(4) Athorfold v. Beard, 2 T. R. 614. 616.

tenants and the lord, as between the tenants themselves; (1) and it is now a matter of course to grant a rule for the inspection of the court-rolls and ancient writings of a manor, on the application of a tenant, who has been refused by the lord.

Who may inspect.

This privilege of inspection is confined to the tenants of the manor, and does not extend to third persons, who have no concern or connection with the manor-court or the court-rolls. Thus, in an action of trespass, where the question was, whether the place, in which the trespass was alleged to have been committed, was within the manor of the plaintiff, or part of a manor claimed by the defendant, the Court held, that the defendant, who, as it appeared from his affidavit, was not a tenant of the plaintiff's manor nor claimed any interest under him, could not be entitled to an inspection. (2) And it may be laid down as a general rule, that where the question is on the custom of a manor between the lord and a stranger, the lord will not be obliged to let him have an inspection of the rolls, because, in a dispute with a stranger, they may be considered as his private evidence: but if the dispute is between tenants of the manor, or between the lord and a tenant, the lord shall produce the roll, and permit copies to be taken.

Corporation-books.

Corporation-books are open to the members of the corporation, as court-rolls are to the tenants of the manor.*(*r*) Thus, where a mandamus had been granted, to admit a person into a corporation, and by the returns it appeared to be a question, whether the master, under whom he had served, had been admitted to

(1) Roe v. Aylmer, Barnes, 236. Hobson v. Parker, ib. 257. Addington v. Clode, 2 Black. Rep. 1030. Folkard v. Hemet, ib. 1061. R v. Shelley, 2 T. R. 141. R. v. Lucas, 10 East, 235. Bateman v. Phillips, 4 Taunt. 162.

(2) Talbot v. Villeboys, cited from MS. by Buller J. 3 T. R. 142. Smith v. Davies, 1 Wils. 104. Bp. of Hereford v. D. of Bridgewater, Bunb. 269. Attorney-General v. City of Coventry, Bunb. 290.

* By stat. 32 G. 3, c 58, s. 4, a penalty of a hundred pounds is incurred by an officer of the corporation, having the custody of the corporation records, who shall refuse to allow any other officer or member to inspect books and papers, wherein are entered the admission or swearing in of the freemen, burgesses, or members of the corporation, and to take copies or minutes of such admission, &c. Books, containing orders for the admission and swearing in of the burgesses, are not within the provisions of the statute. Davies v. Humphreys, 3 Maule & Selw. 223.

(*r*) See Note 814, p. 1168.

his freedom in the corporation, a rule was moved for, on the part of the person claiming admission, to inspect the books of the corporation; and the court held, that every member has a right to inspect and take copies of corporation-books for any matter that concerns himself, even in a dispute with strangers; but, as the return had pointed out the necessity of inspecting them for a particular purpose, the rule should be confined to such books as contained the admissions of freemen. (1)

Where an information in the nature of a *quo warranto* had been obtained, at the relation of corporators, against a person charged with unlawfully holding a corporation-office, the Court held, that these relators were entitled to inspect the books, and that the rule should be limited to the inspection of such papers, as related to the subject-matter in discussion. (2) And in an action for the breach of a bye-law, restraining all but freemen from exercising trades within a corporate city, the Court will compel the corporation to allow the defendant to inspect the bye-law in their books. (3)

Who may inspect.

This right of inspecting the muniments of a corporation is confined to the members of the corporate body. A stranger has no better right to inspect corporation-books, than to inspect the books of any private person. On a prosecution against a person for practising physic, (not being a member of the college of physicians, nor having a licence, not being a graduate of either university,) the defendant moved for leave to inspect the book of the college of physicians; but the Court refused to grant the rule, as the defendant, who was not a member, had no right to see the book. (4) And in an action of trespass, where the defendant justified under a corporation for destraining for a toll, the Court refused a similar rule to the plaintiff, who was a stranger to the corporation. (5) (*s*)

(1) R. v. Fraternity of Hostmen in Newcastle, 2 Stra. 1222.

(2) R. v. Babb, 3 T. R. 579. Crew q. t. v. Saunders, 2 Str. 1005. Corporation of Barnstaple v. Lathey, 3 T. R. 303. Young v. Lynch, 1 Black. Rep. 27.

(3) Harrison v. Williams, 3 Barn. & Cress. 162.

(4) Dr. West's case, cited 1 Wils. 240. Allen v. Tapp, 2 Black. Rep. 850.

(5) Cited by De Grey, C. J., in Hodges v. Atkis, 3 Wils. 398, and by Lawrence, J., in 8 T. R. 594. Mayor of Southampton v. Graves, 8 T. R. 590.

(*s*) See Note 815, p. 1168.

A different practice was at one time introduced in courts of law, (1) upon the ground, that, on filing a bill for disclosure in a court of equity, an inspection would be granded as a matter of course, and that it would only cause unnecessary expense to send the parties into that court. But this practice, which was not warranted by earlier authorities, (2) nor comformable to the practice of courts of equity, has been long discontinued; and the rule of law, now established, is, that in disputes between several members of a corporation an inspection of the corporation-books will be granted, because each has a right to see them; but an inspection will not be granted in the case of a corporation, when a similar inspection would be refused, if the suit were between private persons. No distinction is to be made, in this respect, between a corporation aggregate and a corporation sole, nor between a corporation sole and a private person suing in his individual capacity. (3) (*t*)

Inspection when not compelled.

The rule for inspecting court-rolls, corporation-books, and other public writings, will not be allowed, where the party, who has them in his custody, would, by producing them for inspection, disclose any evidence of a criminal nature, or expose himself to a prosecution. (*u*) On an information, therefore, against several persons, for executing on office of trust without taking the oaths, the Court refused a motion for leave to inspect some books kept by the defendants, in which they had entered their elections, receipts, and disbursements, as it would have compelled them to give evidence against themselves in a criminal prosecution; (4) and a similar motion was refused, on an information against two overseers for making a rate without the concurrence of the church-wardens. (5) Another case to the same effect is the case of the King v. Dr. Purnel, (6) where, on an information against the defendant for a misdemeanor in his office of vice-chancellor of the university of Oxford, a rule for taking a copy of the University-statutes, in the care of the

(1) Mayor of Lynn v. Denton, 1 T. R. 689. Corporation of Barnstaple v. Lathey, 3 T. R. 303.

(2) Dr. West's case, cited 1 Wils. 240. R. v. Dr. Bridgeman, 2 Str. 1203. Mayor of Exeter v. Coleman, Barnes, 238. Hodges v. Atkis, 3 Wils. 398.

(3) 8 T. R. 593.

(4) R. v. Mead, 2 Lord Raym. 927. R. v. Worsingham, 1 Lord Raym. 705. R. v. Cornelius, 2 Str. 1210.

(5) R. v. Lee, cited 1 Wils. 240.

(6) 1 Wils. 239. 1 Black. Rep. 37. R. v. Heydon, 1 Black. Rep. 351. See also R. v. Earl of Cadogan, 5 Barn. & Ald. 902.

(*t*) See Note 816, p. 1169. (*u*) See Note 817, p. 1169.

keeper of the archives, was refused by the Court of King's Bench, after great consideration ; and the principle, that no man shall be bound to criminate himself, was fully recognized.

Quo warranto.

This principle will not apply to the case of informations in the nature of a *quo warranto*, for usurping a franchise, or intruding into a corporation office; for such informations, although originally and strictly criminal methods of prosecution, are applied to the purpose of trying civil rights, and are considered at present as merely civil proceedings. On an information, therefore, exhibited at the relation of a member of a corporation, against a person for unlawfully executing an office, the relator, who as member has a right and interest in the books of the corporation, may obtain an inspection and copy of such, and of such only, as relate to the subject-matter in discussion. (1)

Parish book.

Private use.

Public.

In a case very lately before the Court of King's Bench,(2) an action having been brought for a libel contained in a written statement, which the defendant had drawn up respecting the plaintiff's conduct, the defendant applied for a rule to inspect certain documents belonging to the parish, then in the plaintiff's possession, from which documents he had drawn up his statement by the authority of the vestry. The inspection was required, with the view of enabling the defendant to justify in the action. But the Court refused to order the plaintiff to furnish evidence against himself: if the papers, the Court added, had been wanted for the purpose of advancing any parochial right, the case would have been different. (*v*)

How to obtain inspection.

The motion for a rule to inspect and take a copy, where an action is depending, is founded on an affidavit stating the circumstances under which the inspection is claimed, and stating further, that an application has been made in the proper quarter, for permission to make the required inspection, which has been refused. (3) Where a motion for a mandamus, or for an inform-

(1) R. v. Babb, 3 T. R. 579.

(2) May v. Gwynne, 4 Barn. & Ald 301.

(3) Roe v. Aylmar, Barnes, 236. In Threlfale v. Webster, 1 Bing. 161, a rule nisi was obtained on an affidavit, alleging that the bills, on which the action was brought, had come into the defendant's hands by fraud ; but the particulars of the fraud were not stated; and on an affidavit by the defendant, denying the fraud, the Court of C. P. discharged the rule.

(*v*) See Note 818, p. 1169.

action in the nature of a *quo warranto* in a corporation, is depending, the Court will grant a rule absolute in the first instance. (1) But when the motion is for a writ of mandamus to inspect, grounded upon affidavits, the rule, then, to be granted, is only a rule to show cause.

When.

With regard to the proper stage of the proceedings for making the application, it may be observed, that the Court has refused the motion in an action against a coporation upon a right of toll, *because issue was not joined*, so that it could not appear, whether an inspection would be necessary. (2) And in the case of Dr. Groenvelt v. Dr. Burwell, where the plaintiff applied for a copy of the proceedings, instituted against him by the college of physcians, the Court admitted the rule for inspecting the proceedings to be usual, for the sake of evidence, *after issue joined*, but not by way of assisting the party to plead. (3) If a rule has been granted to show cause, why a mandamus should not be awarded, the Court will not make a rule for inspecting and taking copies, until the first rule is made absolute, and a return is made to the mandamus; (4) and it has been thought the most convenient practice, where a rule *nisi* for a *quo warranto* information has been obtained, not to grant an inspection, until the information is granted. (5)

Where no action depending.

If no action is depending, the proper motion is for a rule to show cause, why a writ of mandamus should not issue, commanding the officer who has the custody of the books, to permit the party to inspect and take a copy. (*w*) The affidavit, upon which this motion is founded, ought to state clearly the right, under which the inspection is claimed, and that the inspection has been refused. In a case of this kind, where an inspection of the court-rolls of a manor was applied for, the party stated in his affidavit a *prima facie* title to a copyhold of the manor; and the Court of King's Bench held, that, as he was clearly entitled to the copyhold, unless it had been conveyed away by those under whom he claimed, he had a right to see, whether any such con-

(1) R. v. Shelley, 3 T. R. 141.
(2) Hodges v. Atkis, 3 Wils. 398. 2 Black. Rep. 877, S. C.
(3) Carthew, 421.
(4) Per Cur. in R. v. Justices of Surrey, Say, 144.
(5) By Ashurst J. in R. v. Babb, 3 T. R. 581. R v. Hollister, Rep. temp. Hard. 245.

(*w*) See Note 819, p. 1170.

veyance appeared on the rolls; and the Court therefore made the rule absolute, so far as related to the copyhold lands, the subject of the party's claim. (1)(*x*)

(1) R. v. Lucas, 10 East, 235; and see 3 T. R. 142. R. v. Tower, 4 Maule & Selw. 162.

(*x*) See Note 820, p. 1170.

CHAP. VIII.

Of the Proof of Deeds, Agreements, &c.

The nature and proof of public writings having been considered, the next branch of the subject relates to private writings. In treating of this part of written evidence, it will not be attempted to describe all the various kinds and requisites of private writings,—which would far exceed the limits of the present work. The enquiry will be confined, principally, to the consideration of the regular mode of proof, by which a written instrument may be introduced and admitted in evidence. The requisite of stamping also, and the admissibility of parol evidence explanatory of written instruments, will form a material part of the enquiry.

The first section of the present chapter treats of the proof of deeds and agreements, and other writings of a similar description; the second section treats of the proof of wills.

Sect. I.

Of the Proof of Deeds, Agreements, &c.

The principal subjects treated of in the present section are, first, the process for compelling a person to produce writings in his possession; secondly, the effect of a notice to a party to produce writings; thirdly, the admissibility of secondary evidence of writings which have been lost or destroyed; fourthly, the proof of the execution of deeds and other writings; fifthly, the proof of handwriting in general.

First, of the process for compelling a person to produce writings in his possession.

Subpœna duces tecum.

If any deed or other writing, necessary to be produced at the trial of a cause, is in the possession of a third person, the legal process for compelling him to produce it, is by suing out a writ of *subpœna ad testificandum*, to enforce his personal attendance, and inserting a special clause, called a *duces tecum*, which specifies the writings required, and commands him to produce them at the trial. (*y*) The writ of *subpœna duces tecum*, like some other writs of undoubted antiquity, is not to be found in the *registrum brevium;* but it can be traced in practice as far back as the time of Charles II., and probably existed much earlier, as such a compulsory process is essential to the constitution of courts of justice. A witness, served with this *subpœna*, is obliged to attend; and, though it will be a question for the consideration of the judge, whether he ought to be compelled to produce the writings in his possession, yet undoubtedly he ought to be ready to produce them, if ordered by the Court; and, in case of disobedience without sufficient cause, will be liable to an attachment, or to a special action for damages. (1)(*z*)

Production excused when.

If the writing, which the witness is called upon to produce, would have a tendency to subject him to a criminal charge, or to a penalty, (2)(*a*) or any kind of forfeiture, the court will excuse him from producing it, as well as from answering any question of the same tendency; but, from analogy to the rule respecting parol testimony, (and there seems to be no good reason for allowing a greater privilege in the one case, than in the other,) he would not be excused from producing a paper in his possession, relevant to the matter in issue, on the ground that it might establish, or tend to establish, against him the fact of his being in debt, or might subject him to a civil suit. (3)(*b*)

Rule to produce.

If writings are in the possession of a party to the suit, the other party has, in general, no means of compelling their production. In some instances, indeed, where the writing is deposited in the custody of a defendant, as a trustee for all parties

(1) Amey v. Long, 9 East, 473. (2) Whitaker v Ized, 2 Taunt. 115.
Corsen v. Dubois, Holt, N. P. C. 239.
Reed v. James, 1 Stark. N. P. C. 132. (3) See stat. 46 G. 3, c. 37.
Field v. Beaumont, 1 Swanst. 209.

(*y*) See Note 821, p. 1170. (*z*) See Note 822, p. 1171. (*a*) See Note 823, p. 1171. (*b*) See Note 824, p. 1171.

Rule to produce.

interested, courts of law will order him to furnish the plaintiff with a copy, and produce the original at the trial. Thus, in an action for a stake won at an horse-race, the defendant, who was the stakeholder, was ordered to produce a copy of the racing articles, without which the plaintiff could not proceed.(1) So, in a late case, in an action of covenant, the Court of Common Pleas granted the plaintiff a rule for taking a copy of an indenture of assignment of a lease, made between the plaintiff and defendant, as the only part of the indenture, which had been executed, was in the hands of the defendant: (2) the parties, in this case, having executed one part only of the indenture, in order to save the expense of double stamps, the Court thought it a necessary consequence, that the party who had the custody, undertook to produce the deed, when requisite for the use of the other contracting party. (*c*)

Ship's articles.

In an action by seamen to recover wages, the defendant is compellable to produce the ship's articles: (3) for, the contract for wages always remains in the possession of the master, and the statutes (which require a written agreement in the case of foreign voyages, (4) and in the case of certain vessels employed in the coasting trade,) (5) expressly enact, that where it becomes necessary to produce the contract in court, no obligation shall lie on the seamen to produce it, but on the master or owners of the ship; and that no seaman shall fail, in any suit or process for the recovery of wages, for want of its production. (*d*)

Party interested in a document.

Where a person is sued on a written security, which he has given for the benefit of third persons, and he afterwards gets possession of the writing, the Court, on the application of the plaintiff, who claims an interest in the paper, though he has not signed it as a party, will compel the defendant to produce it, that it may be stamped, previous to the trial. (6) (*e*) The ground

Stamp.

(1) Gracewood v.——, Barnes, 439.

(2) Blakey v. Porter, 1 Taunt. 386. King v. King, 4 Taunt. 666.

(3) Johnson v. Lewellyn, 6 Esp. N. P. C. 101. 1 Taunt. 386.

(4) St. 2 G. 2, c. 36. This statute does not apply to the case of a British seaman, who enters on board of a foreign ship in a British port, but is confined to voyages on board of British ships. Dickman v. Benson, 3 Campb. 290.

(5) St. 31 G. 3, c. 39.

(6) Bateman v. Philips, 4 Taunt. 157. The writing was originally deposited in the hands of a third person for the benefit of the creditors of a bankrupt, who brought the action.

(*c*) See Note 825, p. 1175. (*d*) See Note 826, p. 1175. (*e*) See Note 827, p. 1176.

Rule to produce.

of the application, is, that the applicant has an interest in the writing, the production of which is required; and he may be interested, though not, technically speaking, a party to the instrument. (*f*) A person, who takes an estate by way of remainder, is not a party to the deed, by which his estate is created, but he has a strong interest in the deed, and is entitled to compel the production. (1)

But the Court will not compel a person to produce a written instrument in his possession that it may be stamped, on the application of one who is not a party to the instrument, nor interested in it. (2) And where an instrument is executed by two parties, each of whom keeps a part, the Court will not compel the one party to produce his part, in order to support an action against himself: (3) if, for instance, a bond were executed, and afterwards lost by the obligee, he has no right to demand of the obligor to produce a copy of the bond in his possession. (4) (*g*)

Agent's books.

In an action between the plaintiff (a factor) and defendant (a grazier,) the Court of King's Bench, on the motion of the defendant, made a rule for the plaintiff to show cause, why he should not produce at the trial the several books, in which he entered the amount of beasts sold, and of money received on the defendant's account; and no cause being shown, the rule was made absolute. (5) The rule, which Lord Mansfield laid down in such cases, is said to be, that wherever the defendant would be entitled to a discovery, he should have it in a court of law, without going into equity. (6) (*h*)

Action on policy.

In causes on policies of insurance, it is now the common practice to obtain a judge's order, calling upon the assured to produce to the underwriters, upon affidavit, all papers in the possession of the former relative to the matters in issue; and if the one party is not content with such papers as

(1) See supra, n. (6) 4 Taunt. 161.

(2) Osborne v. Taylor, cited 4 Taunt. 159, 162. Brown v. Rose, 6 Taunt. 283.

(3) Street v. Brown, 1 Marshall, 610. 6 Taunt. 302, S. C. Ratcliffe v. Bleasby, 3 Bing. 148. Pickering v. Noyes, 1 Barn. & Cress. 262.

(4) 6 Taunt. 305

(5) Goater v. Nunnely, 2 Str. 1130. Ward v. Apprice, 6 Mod. Rep. 264, contra.

(6) Barry v. Alexander, 25 G 3, K. B. 1 Tidd. Pr. 618. See Smith v. Duke of Northumberland, 1 Cox Ch. C. 363, 365. Burton v. Neville, 2 Cox, 242. Campbell v. French, ib. 286.

(*f*) See Note 828, p. 1176. (*g*) See Note 829, p. 1176. (*h*) See Note 830, p. 1177.

are produced under the order, the other party will be obliged to make an affidavit, denying the relevancy of those which are withheld. (1) (*i*) This practice has been adopted for its great convenience, as it saves the delay and expense of a bill in equity. But the practice in Chancery invariably is, that a party is entitled only to extracts of letters, if the other party will swear, that the passages extracted are the only parts relating to the subject-matter. (2) (*j*) Notice to produce.

Secondly, of the effect of a notice to a party to produce writings in his possession.

In general, one party has not the means of compelling the other party to produce any writings in his possession, however necessary they may be for the prosecution of his suit. (3) If such evidence is required, the rule both in civil and in criminal cases, (4) is to give the opposite party or his attorney (5) a regular notice to produce the original, which is in his possession; not, that on proof of the notice he is compellable to give evidence against himself, or that, if he refuses to produce the papers required, such a circumstance is to be considered as conclusive against him, (6) (*k*) but the consequence will merely be, that the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents. (*l*) Notice to produce.

Service of the notice upon the wife of the party's attorney, late in the evening before the trial, has been held to be insufficient. (7) (*m*) Notice to produce a paper connected with the cause, given to the attorney on the evening of the second day before the trial, the party being then abroad, has been held to be sufficient by Lord Tenterden. (8) (*n*) Service.

(1) Clifford v. Taylor, 1 Taunt. 167. Goldschmidt v. Marryat, 1 Campb. 562

(2) 1 Taunt. 167.

(3) See the case of Entick v. Carrington, 19 Howell's St. Tr. 1073, and see cases in p. 438, supra, n. (3)

(4) The attorney-General v. Le Merchant, 2 T. R. 201, n.

(5) 2 T. R. 203, n. Cates q. t. v. Winter, 3 T. R. 306.

(6) Cooper v. Gibbons, 3 Campb. 363.

(7) Doe, dem. Wartney, v. Grey, 1 Starkie, N. P. C. 283.

(8) Bryan v. Wagstaff, 1 Ry. & Mo. 328.

(*i*) See Note 831. p. 1178. (*j*) See Note 832, p. 1178. (*k*) See Note 833, p. 1182. (*l*) See Note 834, p. 1182. (*m*) See Note 835, p. 1183. (*n*) See Note 836, p. 1184.

Notice to produce.

Proof of deed in party's possession.

before this secondary evidence can be admitted, it ought to be clearly shown, that the writing required is in the possession of the other party, and that a notice to produce it has been regularly served. The degree of evidence which may be necessary to prove the fact of possession, will depend so much on the nature of the transaction, and the particular circumstances of each individual case, that it is scarcely possible to lay down any general rule upon the subject. Slight evidence may be sufficient, in many cases, to raise a presumption, that the writing is in the possession of a party, when it exclusively belongs to him, and regularly ought to be in his possession according to the course of business. In the case of Henry v. Leigh, (1) the solicitor to a commission of bankrupt proved, that he had been employed by the defendant to solicit his certificate under the commission, and that, looking at the entry of charges, he had no doubt the certificate was allowed: it was therefore presumed, that the certificate came into the defendant's possession. (*o*)

Possession of third persons.

In certain cases, though the written instrument, which is required, is not in the possession of the party to the suit, but in the possession of a third person, yet if there is a privity between such person and the party, a notice to the party may be sufficient. Thus, in the case of Baldney v. Ritchie, (2) an action against the owner of a vessel for goods supplied for the use of the vessel, Lord Ellenborough held, that a notice to the defendant to produce an order, which he had given to the captain, was sufficient to admit the plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in the possession of the captain: the evidence was held to be admissible, on account of the privity between the owner and the captain. (*p*)

Captain.

Banker.

A check given by a party to a third person, which would be in the possession of the banker of the party, has been considered as in the possession of the party himself, within the meaning of the rule as to notices for the production of papers. (3) (*q*) In an action against a sheriff, notice to the defendant's attorney to produce a warrant, which, after execution, was returned to the

Under-sheriff.

(1) 3 Campb. 502.
(2) 1 Starkie, N. P. C. 338.
(3) Partridge v. Coates, 1 Ry. & Mo. 156.

(*o*) See Note 837, p. 1187. (*p*) See Note 838, p. 1188. (*q*) See Note 839, p. 1189.

defendant's under sheriff, is sufficient to entitle the plaintiff to give secondary evidence of the contents. (1) (*r*) Notice to produce.

If one party calls for books or writings in the possession of the other party, but, when they are produced, declines using them, the mere calling for them will not make them evidence for the adverse party. (2) It may, said Lord Kenyon, be matter of observation to the counsel on the other side, that the entries in the books were in favour of his client, but cannot entitle him to offer the books in evidence to the jury. If, however, the party who has called for the books, inspects them, he thereby makes them evidence for the other party, although he has not used them himself in evidence. (3) (*s*) Where books are refused, it is a suspicious circumstance, and open to much observation, but it will not be conclusive against the party. (*t*) The regular time of calling for the production of papers and books, is not until the party who requires them, has entered upon his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to their contents, although the notice to produce them is admitted. (4) "The evidence," said Lord Ellenborough, in the latter of the cases here cited, "cannot in strictness be anticipated, although it may be rigorous to insist upon the rule, and a close adherence to it may be productive of inconvenience." Writing called for, but not used.

The rule, which requires, that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the cause, has been made with good reason; in order that the party may not be taken by surprize, in cases where it must be uncertain, whether such evidence will be brought forward at the trial by the adverse party. But this reason will not apply to cases, where, from the nature of the proceedings, the defendant has notice, that the plaintiff means to charge him with the possession of the instrument. It cannot, in such cases, be necessary to give any other notice, than the action itself supplies. In an action of trover, Notice, when dispensed with.

1. Notice from the proceedings.

(1) Taplin v. Atty, 1 Ry. & Mo. 164.
(2) Sayer v. Kitchen, 1 Esp. N. P. C. 210.
(3) Wharam v. Routlege, 5 Esp. N. P. C. 235.
(4) Graham v. Dyster, 2 Starkie, N. P. C. 23. Sideways v. Dyson, 2 Starkie, N. P. C. 49.

(*r*) See Note 840, p. 1190. (*s*) See Note 841, p. 1190. (*t*) See Note 842, p. 1192.

Notice to produce.

therefore, for a bond, the plaintiff has been allowed to give parol evidence of the contents, to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce the original. (1) (*u*) And on a prosecution for stealing a promissory note, or other writing, described in the indictment, parol evidence of the contents will be received, without any formal notice to the prisoner to produce the original. In Aickle's case, (2) on an indictment for stealing a bill of exchange, all the judges held, that such evidence had been properly admitted, though it was proved in that case, that the bill had been seen, only a few days before the trial, in a state of negotiation in the hands of a third person, who had been served with a *subpœna duces tecum*, but who did not appear. (*v*) And in Layer's case, (3) on an indictment for high treason, where it was proved, that the prisoner had shown a person the paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. And in the case of De la Motte, (4) on an indictment for a traitorous correspondence with the French government, where the question was, whether examined copies of the treasonable papers, which had been secretly opened at the post-office, and copied, and then forwarded to their place of destination, were admissible in evidence; the Court held, that they might be admitted, after proof that the originals were in the hand-writing of the prisoner.

2. Fraudulent possession.

Nor does the principle of the rule apply to the case, where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as, where a witness was called, on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared, that after the commencement of the action he had given it to the plaintiff; in this case,

(1) How v. Hall, 14 East, 274. Scott v. Jones, 4 Taunt. 865. Jolley v. Taylor, 1 Campb. 143. Butcher v. Jarrat, 3 Bos. & Pull. 143. Wood v. Strickland, 2 Merivale, 461.

(2) 1 Leach. Cr. C. 330. Butler's case, 13 Howell St. Tr. 1254, which was a prosecution for the forgery of a bond.

(3) 6 St. Tr. 263. 16 Howell's St. Tr. 170. S. C. Francia's case, 15 Howell St Tr. 941. R. v. Moors, 6 East, 421. n.

(4) Cor. Buller, J., and Heath, J. O. B. 1781, 1 East, P. C. 124, from MS. of Gould, J. These copies were rejected on another ground, because the originals had not been traced to the prisoner's possession. See 21 Howell St. Tr. 737.

(*u*) See Note 843, p. 1193. (*v*) See Note 844, p. 1194.

though a notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted in fraud of the *subpœna*. (1) (*w*) Notice to produce.

The counterpart of a deed is evidence against the person who signed it, and against his assignee, without giving notice to produce the original. Thus, in an action against the master of an apprentice, for not inserting in the indenture of apprenticeship the true consideration, an averment in the declaration, that A. B. by a certain indenture, put himself apprentice to the defendant, may be proved by that part of the indenture which the defendant executed. (2) So, in an action of ejectment, upon a condition of re-entry for non-payment of rent, against the assignee of a lease, proof of the counterpart, executed by the original tenant, is sufficient proof of the assignee's holding on the same terms. (3) (*x*) 3. Counterpart, evidence without notice.

A written paper, which has been delivered by the defendant to a person present at a meeting, as a copy of certain resolutions about to be proposed and read, and which is proved to correspond with the resolutions actually proposed, is good evidence of those resolutions, without proof of any previous notice to the defendant to produce the paper from which the resolutions appeared to be read. This paper was considered, as against the party to whom it applied, to be fully as good evidence as any that could be produced. (4) (*y*) Resolutions at public meeting.

Another exception may be mentioned, in the case of an action by a seaman to recover wages, in which the captain is compellable to produce the ship's articles at the trial, though he has not received a notice for that purpose, if he would found any objection upon them, or resort to them in making his defence. The statute has introduced an exception to the general rule upon this subject. (5) 4. Action by seaman.

It seems now to be the better opinion, that neither party will Deed in court in possession of the other party.

(1) Leeds v. Cook, 4 Esp. N. P. C. 256.
(2) Burleigh v. Stibbs, 5 T. R. 465.
(3) Roe dem. West v. Davis, 7 East, 363. Mayor, &c. of Carlisle v. Blamire, 8 East, 487.
(4) R. v. Hunt, 3 Barn. & Ald. 572. Vide supra, p. 221, S. C., and Gorton v. Dyson, in 2d vol.
(5) Bowman v. Manzelman, 2 Camp. 315.

(*w*) See Note 845, p. 1195. (*x*) See Note 846, p. 1196. (*y*) See Note 847, p. 1196.

Notice to produce.

be allowed, either in an examination in chief or in a cross-examination, to enquire into the contents of a deed, merely because the opposite party has the original deed in his possession, in court, at the time of the trial; and that the opposite party may object to such parol evidence of the contents, on account of his not having received a previous notice to produce the original. In the case of Doe on the demise of Haldane and Urry v. Harvey, (1) the Judges of the Court of King's Bench appear to have differed in opinion upon this point. In that case, title was deduced to Haldane under a will; but one of the plaintiff's witnesses said, on cross-examination, that Haldane had conveyed all interest in the premises to Urry, before the time of the demise in the declaration, and that the deed was in court. Upon this, it was insisted, that, as the plaintiff's witness proved the title out of Haldane, and as the deed of conveyance was in the court, the deed ought to be produced in evidence to show a title in Urry, the other lessor of the plaintiff. The counsel for the plaintiff, on the contrary, refused to produce the deed, insisting, that the plaintiff ought to recover under the one or the other of the lessors; for, if the one had parted with the title, the other had acquired it. But Mr. J. Aston, who tried the cause, being of opinion, that the plaintiff ought to give further evidence to ascertain the title, under which he was to recover the term, nonsuited the plaintiff: and on a motion afterwards for setting aside this nonsuit, Lord Mansfield, after observing that in the action of ejectment the plaintiff could not recover except upon the strength of his own title, said, "It was plain the plaintiff had no title under Haldane, who had conveyed away all the interest in the premises to the other lessor, and that as to his claim of a title under Urry, the plaintiff had not proved any title; the jury could not have found for the plaintiff under the deed of conveyance to Urry, unless it were produced, and probably there was something in the deed, which would have shown, that Urry had no title." Lord Mansfield laid the principal stress on the fact of the plaintiff's refusing to produce the conveyance from Haldane, which was admitted to be in court. "The want of notice," he said, "was no objection in this case, because they had the deed in court; and the refusal to produce it warranted

(1) 4 Burr. 2484. See Doe dem. Wartney v. Grey, 1 Starkie, N. P. C. 283.

the strongest presumption, that neither of the lessors had any title." Mr. Justice Aston and Mr. Justice Willes agreed in opinion with Lord Mansfield. But Mr. Justice Yates differed from the rest of the Court. "He founded himself," he said, "upon the rules of evidence. The fact of the conveyance coming out on cross-examination could make no difference. The plaintiff's counsel were not obliged to produce the deed, for no man can be obliged to produce evidence against himself: the only consequence of a notice to produce would have been the admission of inferior evidence." Upon this case it may be observed, that the fact of Haldane's having conveyed away all his interest to Urry seems to have been assumed, as satisfactorily proved; but from the opinion of Mr. Justice Yates, which seems to be the better opinion, it may be collected, that there was no legal proof of any conveyance of title out of Haldane, and that the answer of the witness, upon which the defendant's argument rested, was as inadmissible in evidence on the cross-examination, as it would have been on an examination in chief. The true objection to such evidence is, that the witness was speaking to the contents of a deed, when there had been no notice given to produce the original; and it does not appear to be a sufficient answer to say that the deed is in court; for, if the party had received a regular notice to produce it, he might have come prepared with evidence to repel any inference which the production of the deed might have raised against him.(*z*)

Notice to produce.

A parol notice to produce writings may be proved by the person who delivered the notice, or by one who heard it delivered; (*a*) and a written notice to produce may be proved by a duplicate original, (1) or by an examined copy of the original. (2) A notice to quit in an action of ejectment, (3) and a notice of the dishonour of a bill in an action upon the bill, (4) may be proved in the same manner, (by a duplicate original, or by an examined

Proof of notice.

Notice to quit.

(1) Gollieb v. Danvers, 1 Esp. N. P. C. 455. Surtees v. Hubbard, 4 Esp. N. P. C. 203.

(2) Kine v. Beaumont, 3 Brod. & Bing. 288. 7 Moore, C. P. 112, S. C. A copy of a letter, giving notice of the dishonour of a bill, proved to be a true copy, was adjudged by the Court of Common Pleas to be good evidence of the contents of the letter, without notice to produce the original. And the Court of King's Bench, to whom the point was referred as a matter of general practice, were of the same opinion.

(3) 2 Bos. & Pull. 41.

(4) Ackland v. Pearce, 2 Campb. 601. Roberts v. Bradshaw, 1 Starkie, N. P. C. 28. Langdon v. Hull's, 5 Esp. 157.

(*z*) See Note 848, p. 1197. (*a*) See Note 849, p. 1197.

Notice to produce.

copy,) without notice to produce the original in the possession of the other party. (*b*) It may be objected, that a duplicate is not the best evidence of the contents of the notice delivered, as the supposed duplicate original may be inaccurate, and the contents might be proved to a certainty by the production of the notice itself; but, on the other hand, extreme inconvenience would arise from a stricter medium of proof; for, if a duplicate notice to quit is not sufficient, no more is a duplicate of the notice to produce, and thus notices might be required *in infinitum*. The practice of allowing such proof of a notice seems further to be sanctioned by this principle, that, as the original delivered is in the hands of the other party, it is in his power to contradict the duplicate original, or examined copy, by producing the other on trial, if they vary. (1) When a notice may be either in writing or by parol, and the notice is given in both forms, it may be proved in either form. (2)

Notice of action.

Upon the same principle, where a notice is given to a magistrate previous to the commencement of an action against him, or where a demand is made of a copy of a warrant preparatory to an action against a constable, if another paper is made out at the same time, precisely to the same effect as that delivered, both may be considered originals, and the paper so preserved may be received in evidence without a notice to produce the one delivered. (3) From analogy to these cases, in an action on an attorney's bill, though the plaintiff cannot produce parol evidence of the contents of the bill delivered, without giving notice to produce it, (4) yet a copy, made out at the same time and proved to be correct, has been admitted to be good evidence. (5) (*c*)

Duplicate copy.

A duplicate which has been taken from an original letter, at a single impression, by means of a copying machine, is still only a copy; and therefore cannot be read, without a previous notice to the other party to produce the original, (6) (*d*) or without proof that

(1) By Lord Eldon, C. J. Jory v. Orchard, 2 Bos & Pull. 41.
(2) Smith v. Young, 1 Campb. 440.
(3) 2 Bos. & Pull. 39.
(4) Shaw v. Markham, Peake, N. P. C. 164.
(5) Anderson v. May, 2 Bos & Pull. 237. Philipson v. Chase, 2 Campb. 110. S. P.
(6) Nodin v. Murray, 3 Campb. 228.

(*b*) See Note 850, p. 1198. (*c*) See Note 851, p. 1202. (*d*) See Note 852, p. 1202.

the copy, so taken, was afterwards on comparison found to be correct.

Notice by letter.

Proof of having sent a notice or other paper by the post has been frequently considered, in mercantile transactions, to be sufficient proof of notice to the party to whom it was directed; and this on a principle of general convenience. (*e*) A question has sometimes arisen as to the requisite proof of the fact of sending by the post. In the case of Hagedorn v. Reid, (1) where it became necessary to prove, that a licence to trade had been sent by the plaintiff to A. B., it was proved to be the invariable course of the plaintiff's office, that the clerk, who copies a licence, sends it off by the post, and writes on the copy a memorandum of his having done so; a copy of the licence in question was produced from the plaintiff's letter-book, in the hand-writing of a deceased clerk, who had written a memorandum, stating that the original had been sent to A. B., and a witness, acquainted with the plaintiff's mode of transacting business, swore, that he had no doubt the original was sent according to the statement in the memorandum; this evidence was held to be sufficient.

Putting into post.

The case of Hetherington v. Kemp, (2) supplies an instance where the proof of the fact of putting a letter into the post, was held to be deficient. The question being, whether the defendant had received notice of the dishonour of a bill of exchange, it was proved, that, on the day after the bill became due, the plaintiff wrote a letter addressed to the defendant, stating that it had been dishonoured: that this letter was put down on a table, where, according to the usage of his counting-house, letters for the post were always deposited, and that it was the business of a porter to carry them from thence to the post-office; but the porter was not called, and there was no evidence as to what had become of the letter, after it was put down upon the table. A notice to produce the letter had been served upon the defendant. It was contended for the plaintiff, that this was good *prima facie* evidence, that

(1) 3 Campb. 379. See cases in 2d vol.

(2) 4 Campb. 193.

(*e*) See Note 853, p. 1203.

the letter had been sent by the post. Lord Ellenborough held, that some evidence ought to be given, that the letter had been taken from the table in the counting-house, and put into the post-office. If the porter had been called, and if he had said, that, although he had no recollection of this particular letter, he invariably carried to the post-office all the letters found upon the table, this might have been sufficient; but it was not sufficient to give such general evidence of the course of business in the plaintiff's counting-house. (*f*)

Deed produced, how proved.

If a party, in compliance with a notice, should produce a deed, or other instrument called for by the adverse party, the next question is, whether the party, who calls for its production, ought to prove its execution, or whether the writing should be admitted, without proof, against the party producing it, as duly executed. The general rule, laid down by Mr. Justice Buller, is, that "in civil actions, where a plaintiff wishes to give in evidence a deed in the defendant's custody, he gives the defendant notice to produce it: and the deed, when produced, must *prima facie* be taken to be duly executed; because the plaintiff, not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution." (1) In a case of settlement, therefore, where the respondents had given notice to the appellants to produce an indenture of apprenticeship, by which the pauper was bound in the appellant parish, and which indenture was accordingly produced at the trial of the appeal, the Court of King's Bench held, that the court below ought not to have required the respondents to prove the execution, but that the indenture should have been admitted *prima facie* as duly executed. (2)

In the next reported case on this subject, the case of Gordon and others v. Secretan, (3) Lord Ellenborough, C. J. said, that the case of the King v. Middlezoy had been much questioned at the time, and since over-ruled; and that the production of an instrument at the trial, in pursuance of a notice, would not supersede the necessity of proving it by one of the subscribing

(1) 2 T. R. 43.
(2) R. v. Inhabitants of Middlezoy, 2 T. R. 41. 5 T. R. 366.
(3) 8 East, 548. Wetherston v. Edgington, 2 Campb. 94, S. P. Johnson v. Lewellin, 6 Esp. N. P. C. 101.

(*f*) See Note 854, p. 1203.

witnesses, as in ordinary cases. And Mr. Justice Lawrence added, that this point had been so ruled by Lord Kenyon in a subsequent case, where the adverse party, having notice to produce a written instrument, produced it accordingly at the trial, and Lord Kenyon held, that the party, who called for it, was bound to call one of the subscribing witnesses to prove the execution. In the case of Gordon and others v. Secretan, which was as action upon a policy of insurance on shipped goods, the plaintiffs averred in their declaration, that they were interested in the subject-matter of the insurance, and the defendant, intending to dispute that fact at the trial, gave the plaintiffs notice to produce certain articles of agreement made between them and the captain of the ship, by which, as it was contended, the contrary would clearly appear; in pursuance of this notice, the plaintiffs at the trial produced the instrument, attested by two witnesses, and insisted, that the defendant should call one of them to prove the execution. The point was so ruled at *nisi prius*, and afterwards confirmed by the Court of King's Bench. From this case, therefore, it might be inferred, that, if a party to a suit, in consequence of a notice, produces an instrument executed between himself and others, yet that the other party, though a stranger to the instrument, ought to prove the execution, if he means to avail himself of it in evidence. General rule.

The rule, however, has been properly restricted in certain cases. In the case of Pearce v. Hooper (1,) and action of trespass, where the question was, whether the place in which the trespass was alleged, belonged to the plaintiff as part of a certain estate; the defendants gave notice to the plaintiff to produce a deed of conveyance, in which the estate had been conveyed to the plaintiff by a description limited to a number of acres, which, it was said, would necessarily exclude the place in question; the plaintiff produced the conveyance, and, on the authority of the cases before mentioned, it was ruled, that the defendant ought to prove the execution, which, as he was not prepared to prove, the instrument could not be received in Exception. 1. Where the party producing claims under the deed.

(1) 3 Taunt. 62.

evidence. But, on a motion afterwards for a new trial, the Court of Common Pleas were of opinion that it was not necessary for the defendants in this case to call the attesting witness, to prove the execution. The Court admitted, that the mere possession of an instrument by one party cannot, in general, absolve the other party who calls for it, from the necessity of producing the attesting witness. "An instance to illustrate this," said the Chief Justice "has been properly put in the case of a will, cited in the case of Gordon v. Secretan; for, supposing that an heir at law is in possession of a will, and the devisee brings an ejectment, and calls on the heir to produce the will, there the heir claims not under the will, but against the will, and it would be hard, that the will should be taken as proved against him, because he produces it. But that is very different from the case, where a man is called upon to produce a deed, under which he holds an estate. The plaintiff, (added the Chief Justice, with reference to the case then before the Court,) has no interest in the fee simple of the estate, if this deed does not convey it: if, then, he produces the deed, under which he claims, shall it not be taken to be a good deed, so far as relates to the execution, as against himself?" The other Judges concurred in opinion, and a new trial was granted.

In the case of Orr v. Morice (1,) (*g*) which was an action for the use and occupation of premises, against the assignees of a bankrupt, the Court of Common Pleas held, that the deed of assignment of the bankrupt's effects, produced by the defendants at the trial, under a notice from the plaintiff, was admissible in evidence, without proof of the execution by the subscribing witness, as it appeared that one of the assignees had continued to occupy the premises for some time after the act of bankruptcy. The principle to be deduced from these cases is, that, when a party to a suit, in pursuance of a notice, produces an instrument, to which he is a party, and under which he claims a beneficial interest, it will not be necessary that the other party should call an attesting witness to prove the execution. (*h*)

(1) 3 Brod. & Bing. 139.

(*g*) See Note 855, p. 1204. (*h*) See Note 856, p. 1205.

Action between tenant and landlord.

In an action by a lessee against an assignee, if the defendant produce the original lease at the trial, it will not be necessary for the plaintiff to call a subscribing witness; and the circumstance of the defendant having assigned his interest to a third person, cannot make any difference in the rule. (1)(*i*) In the last case upon this subject, where the attorney of the lessor of the plaintiff, in an action of ejectment, obtained from one of the defendants a lease of the premises in question, granted to him for a term, in order to prevent the defendants from setting it up to defeat the action; this was held to be such a recognition of the lease by the attorney, on behalf of his client, who was to derive a benefit from the possession of the lease, as would dispense with the formal proof of execution, on the production of the instrument from the hands of the attorney. (2)(*j*)

Action against sheriff.

Another very reasonable exception to the general rule has been made, in the case of an action against a sheriff, for taking insufficient pledges in a replevin bond; in which it has been held, that the replevin bond produced by the sheriff, a public officer, whose duty it was to take such bond,) may be admitted, without proof, against him, as duly executed. (3)

How much to be read.

If a party, in compliance with a notice, produces a written instrument in his possession, he is entitled to have the whole read; (4) and if the instrument refer to others with such particularity as to make it necessary to inspect them, that the sense may be complete, or, referring to other writings, adopt them as part of its own meaning, he may insist on having these also read in evidence. (5)(*k*)

Thirdly, as to the admissibility of secondary evidence of writings, which have been lost or destroyed.

(1) Burnett v. Lynch, 5 Barn. & Cress. 589.

(2) Doe, dem. Tyndale v. Heming, 6 Barn. & Cress 29.

(3) Scott v. Waithman, 3 Starkie, N. P. C. 168. Barnes v. Lucas, Ry. & Mo. 264, S. P. There was no count in the declaration, for omitting to take a replevin-bond. Notice had been given to the defendant to produce the bond. The attesting witness had been subpœnaed by both parties, and was present at the trial.

(4) See ante, p. 359.

(5) Johnson v. Gilson, 4 Esp N. P. C. 21. Wheeler v. Atkins, 5 Esp. 246. Falconer v. Hanson, 1 Campb. 171.

(*i*) See Note 857, p. 1206. (*j*) See Note 858, p. 1206. (*k*) See Note 859, p. 1206.

Secondary evidence of writings.

If a party intend to use a deed or any other written instrument in evidence, he ought to produce the original, if he has it in his possession;(*l*) but, if the instrument is in the possession of the other party, who refuses to produce it after a reasonable notice, or if the original is lost or destroyed, secondary evidence, which is the best that the nature of the case allows, will then be admitted. (*m*) And the secondary evidence, if in writing, need not be stamped. (1)

On non-production.

In case the other party refuse to produce an original deed or agreement, which is in his possession, and which he has had notice to produce, secondary evidence of the contents will be received without proof of the execution of the original. (2) After once refusing to produce, and obliging his opponent to resort to secondary proof, he shall not be at liberty to retract, or by producing the original, when it is not wanted, to insist upon the formal proof of its execution. (3)(*n*)

On proof of loss.

If the original has been lost or destroyed, and two or more parts have been executed, the loss or destruction of all the parts should be proved, before secondary evidence of the contents can be received (4)(*o*); and the original deed ought to be proved to have been duly executed (5), unless proof of the execution would be dispensed with, if the original itself were produced, or unless the want of the original is occasioned by the default of the other party, in which case, the execution may reasonably be presumed against him. (*p*) So, where an original note of hand is lost, a copy cannot be read in evidence, unless the note is proved to be genuine. (6)

Power of attorney.

On the impeachment of Lord Melville, (7) the Committee of managers, in order to prove the contents of a letter of attorney, (under which, it was said, Mr. Douglas had been authorized by Lord Melville to apply to the Treasury for monies from time to

(1) Munn v. Godbold, 3 Bing. 292.
(2) Doxon v. Haigh, 1 Esp. N. P. C. 410. Cooke v. Tanswell, 8 Taunt. 450. 2 Moore, C. P. 313, S. C.
(3) Jackson v. Allen, 3 Stark. N. P. C. 74.
(4) Bull. N. P. 254. R. v. Castleton, 6 T. R. 236.
(5) R. v. Sir T. Culpepper, Skinner, 673, by Holt, C. J.
(6) By Lord Hardwicke, C. J. Goodier v. Lake, 1 Atk. 246.
(7) 29 Howell St. Tr. 714—723.

(*l*) See Note 860, p. 1207. (*m*) See Note 861, p. 1214. (*n*) See Note 862, p. 1219. (*o*) See Note 863, p. 1220. (*p*) See Note 864, p. 1220. (*q*) See Note 865, p. 1220.

time, as his paymaster,) offered in evidence an entry in a book, kept in the exchequer, which book contained entries of all the letters of attorney for the receipt of money at the Exchequer. It was satisfactorily proved, that no such letter had been found, on a diligent search, among Mr. Douglas's papers shortly after his death; it was proved also, that an official order had been made out for Mr. Douglas to receive money, under a letter of attorney; and the fact of Mr. Douglas's appointment as paymaster clearly appeared from a letter in Lord Melville's hand-writing, dated only two days after the date of the proposed entry. The clerk of the office also proved, that he had made the entry from the original letter of attorney; which entry purported to contain the names of persons, as attesting witnesses to the letter. After argument, the entry was rejected. "There is no legal proof," said the Lord Chancellor, "of Lord Melville's hand-writing; it does not appear, whether the attesting witnesses are living or dead; nor does it appear, that Mr. Douglas ever received any money under that appointment." For these reasons, it was determined, that the managers had not entitled themselves to read the paper. Upon this, the managers proceeded further (1,) and tendered in evidence a certificate signed by Mr. Douglas as paymaster, and given by him to the Navy-Office, acknowledging the receipt of money by him at the Exchequer; the managers then produced entries in the Bank books, signed by Lord Melville and Mr. Douglas, in the common form of opening an account; and afterwards called a witness, whose name and description corresponded with the name and description of one of the attesting witnesses in the proposed entry; and this witness stated, that he had some recollection, though very slight, (for the entry bore date about 24 years before this time,) of providing a stamp for the power of attorney from Lord Melville to Mr. Douglas, and of attesting it at the navy-pay-office. Upon this evidence, the Lord Chancellor declared his opinion, that the entry was admissible, and the Lords allowed it to be read.(2)

Secondary evidence of writings.

On the hearing of an appeal against an order of removal, (3) the principal question was, whether one person only, or more

(1) 29 Howell St. Tr. p. 723—739.
(2) Ibid. p. 739.
(3) R. v. Stoke Golding, 1 Barn. & Ald. 173.

Secondary evidence of writings.

than one, had been appointed overseer in a particular year; the respondents, who, in order to vacate an indenture of apprenticeship, had to prove, that only one overseer had been appointed in that year, had given notice to the appellants to produce all books and writings in their custody and power, relating to the appointments of overseers; the appellants, being called upon to produce under this notice, produced one parish book, which was the only one in existence, and the parish officer, who produced it, proved that no appointments were kept by the parish; the respondents then proceeded to enquire of a witness, as to there having been, in the particular year, one or more overseers; but, on an objection being taken, the Court of Quarter Sessions held, and the Court of King's Bench afterwards confirmed their opinion, that, as the appointments had been in writing, parol evidence could not be admitted. "The question," said Lord Ellenborough, "is, whether the justices below have done wrong in rejecting the parol evidence. This is clear, that the parol evidence could not be admitted, until the case was ripe for the admission of secondary evidence; now it could not be considered as ripe for that purpose until the respondent parish had exhausted all the proper means of procuring the primary evidence. Have they done this? First, as to the appointment itself, they gave a notice to the parish; and, supposing the parish had the actual custody, that notice would have been sufficient, but this does not appear. Have they then the legal custody? Certainly not; for the legal custody is in the officer, who is the person most interested in the instrument, and who requires its production as a sanction for those acts, which he may be called upon to do under its authority. Now, here there has not been any notice to the overseer himself. I think, therefore," added Lord Ellenborough, "that, as in this case there has been an omission of the means of exhausting the primary evidence, recourse could not be had to that of a secondary nature."

Appointment of overseer.

Proof of loss.

Proof by a witness, that the paper in question was thrown aside as useless, and that he believes it to be lost or destroyed, will be sufficient to let in the secondary evidence. (*r*) This was determined by the Court of King's Bench in the case of Mr. Justice Johnson. (1) A similar point arose in the case of Ben-

Paper thrown aside as useless.

(1) R. v Mr Justice Johnson, 7 East, 66.

(*r*) See Note 866, p. 1222.

Secondary evidence of writings.

sington v. Inglis, (1) in the course of which it became necessary to prove the loss of a licence: the witness said, it was his practice to destroy or put aside such licences amongst the waste papers of his office, as not being of any further use, and that he supposed he had disposed of the licence in question in the same manner as other licences for ships, whose voyages had been performed; but was not sure that it was destroyed. The witness added, he had been afterwards applied to for this licence, and searched for it, but he did not recollect, whether he had found it or not: though he did not think he had found it. Lord Ellenborough, adverting to the evidence, in delivering the judgment of the Court, said, "We are of opinion, that this evidence satisfies what the law requires in respect to search, and establishes with reasonable certainty the fact of the licence being lost. It was not to be expected, that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time on account of any importance being supposed to belong to it." So in the case of Brewster v. Sewell, (2) (which was an action against the defendant for publishing a libel, charging the plaintiff with having defrauded an insurance-company in settling a loss upon a policy against fire,) where it became necessary, in proof of an averment in the pleadings, to account for the non-production of the policy, with a view to give secondary evidence of its contents, it appeared, that the policy, which had been effected about seven years before, had become useless in consequence of a second policy having been effected: the policy had probably been returned to the plaintiff after settling the loss. The clerk of the plaintiff's attorney, a few days before the trial of the action, searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but also in every place which the clerk thought likely to contain a paper of this description; the question was, whether this was a sufficient search; the Court of King's Bench held, that it was sufficient. And in the late case of Freeman v. Arkell, when it became necessary to prove the contents of an information, which had been taken before a magistrate, the magistrate proved, that he had delivered the information to the clerk of the peace or to his deputy; the clerk

(1) 8 East, 278, 288. (2) 3 Barn. & Ald. 296.

Secondary evidence of writings.

of the peace proved also, that no such information was to be found in the office; that a bill had been presented on the charge in this information, which was rejected by the grand jury, and that it was usual in such cases to destroy the informations; the Court held that this was a sufficient search, without calling the deputy clerk; for if the information was delivered to the deputy, it was delivered to him as agent for the clerk of the peace, and not for his own purposes; it should not therefore be presumed to be among his private papers, but rather to be among those in the custody of the clerk of the peace. (1)

Possession in case of death.

If the writing in question is traced into the possession of a particular individual, who is alive, he should be called to give some account of the instrument; if he is dead, an inquiry should be made of such persons as must be presumed to have it in their possession. Thus, in a case of settlement, where it was proved by witnesses, that an indenture of apprenticeship consisted of two parts, one of which had been destroyed, and the other had come to the hands of a person, who was living and had not been subpœnaed, but in answer to an application for the other part, he was proved to have said, that he could not find that part, and did not know where it was, the Court of King's Bench was of opinion, that this was not a sufficient ground for admitting parol evidence of the contents. (2)

In another case of parochial settlement (3,) where it appeared, that only one part of an indenture had been executed, that the pauper and master were both dead at the time of the trial, and that an inquiry for it had been made of the pauper shortly before his death, who said, that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it, and an enquiry had also been made of the daughter and sole executrix of the master, who said, she knew nothing about it; under these circumstances the Court of King's Bench were of opinion, that a sufficient enquiry had been made, to render parol evidence of the contents admissible; and the distinction, taken

(1) Freeman v. Arkell, 2 Barn. & Cress. 494, 497.

(2) R. v. Castleton, 6 T. R. 236. R. v. St. Sepulchre, 2 Bott. 353. Williams v. Younghusband, 1 Starkie, N. P. C. 139.

(3) R. v. Morton, 4 Maule & Selw. 48.

between this case and the case of the King and Castleton, was, that in that case there was evidence of a fact which made a further search necessary, but that in this case the same information which traced the instrument into the pauper's possession, plainly showed, that any further search would have been nugatory. Here, there was no proof, that the instrument ever existed in the possession of the pauper, unless his declaration could be taken as evidence; and if it could, he declared in the same breath, that it existed no longer. When therefore the pauper, by whose information alone the parties were acquainted with the fact of his having had the instrument in his possession, at the very same time declared that it was destroyed, it became unnecessary to search among his papers. (*s*)

Secondary evidence of writings.

The party, after accounting for the absence of the original, by proving its loss or destruction, or that it is in the possession of the other party, who after receiving notice, refuses to produce it, may read a counterpart; or, if there is no counterpart, an examined copy: or, if there should not be an examined copy, he may give parol evidence of the contents. (1) (*t*) The recital of a deed in another deed is evidence of the recited deed, if the original is lost, against the party who executed the reciting deed, or against any person claiming under him. (2) (*u*) And when possession has gone along with a deed during many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence, though not proved to be true, because in such case it may be impossible to give better evidence. (3)*

What secondary evidence admissible.

(1) Villers v. Villers, 2 Atk. 71. Bull. N. P. 294. Doxon v. Haigh, 1 Esp. N. P. C. 409. Waller v. Horsfall, 1 Campb. 501. Fisher v. Samuda, 1 Campb. 192. Liebman v. Pooley, 1 Starkie, N. P. C. 167. 3 Bing. 295.

(2) Com. Dig. tit. Evidence, (B. 5.) Skipwith v. Shirley, 11 Ves. 64. 5 Barn. & Cress. 601.

(3) Buller, N. P. 254.

* The loss of a deed by time and accident, or by any other casualty, is a sufficient reason for dispensing with a profert in pleading, when otherwise a profert might be necessary; (Read v. Brookman, 3 T. R. 151. Bolton v. Bp. of Carlisle, 2 H. Black. 259,) or it may be pleaded, that the deed is in the hands of the opposite party, or destroyed by him (Totty v. Nesbitt, 3 T. R. 153, n. (c).) But if the plaintiff, instead of declaring upon the deed, as lost or destroyed, inadvertently pleads with a profert, (by which he takes upon himself to aver the existence of the instrument, and offers it in court, where it is supposed to remain,) and the defendant pleads *non est factum*, the plaintiff will not be allowed to prove the destruction or loss at the trial, and must be

(*s*) See Note 867, p. 1223. (*t*) See Note 868, p. 1224. (*u*) See Note 869, p. 1235.

Secondary evidence of writings.

A witness, in speaking to the contents of a lost writing, may assist his recollection by entries in his memorandum-book; but these entries are not in themselves admissible in evidence; so that, if the witness has not the memorandum-book at hand, ready to be produced, no objection can be taken on account of its absence.(*v*)

Memorandum book.

In the case of Kensington v. Inglis, before cited, (1) the witness, who proved the loss and contents of a licence, had kept a memorandum-book, in which he made entries of licences for his own information, and for the information of the governor of the country, who granted the licences; he gave it to the governor, but did not know where the book then was, or what the governor had done with it. As to the non-production of the memorandum-book, said Lord Ellenborough, that book, if it had existed, and been in the witness's hand ready to be produced, could not have been produced at the trial, in proof of the fact of granting any particular licence; the only use which it could be allowed to answer, being by way of memorandum, to refresh the memory of the person who made the entries, when he should be called as a witness.

Degree of secondary evidence.

Examined copies, and the parol evidence of witnesses, are the ordinary and regular proof of the contents of lost writings. (*w*) But when a written paper has been traced into the possession of one of the parties to the suit, and he does not produce it after receiving a notice, something less than an examined copy may reasonably be admitted as sufficient, at least to oblige the party to give better evidence by producing the paper itself, if he finds the secondary evidence incorrect. In a late case, where it appeared that the defendant had acknowledged the receipt of a letter of a particular date, which was not produced at the trial when required, it was ruled, that an entry in a letter-book, (purporting to be a copy of a letter of the same date from the plaintiff to the defendant, and inserted by a deceased clerk, who kept the book according to the course of business, and with

(1) 8 East, 279, 289.

nonsuited. (Smith and others v. Woodward, 4 East, 585.) If the deed has been lost or destroyed after the commencement of the action, the plaintiff should move to put off the trial and amend the pleadings, stating the circumstances to excuse the profert. (Ibid.) But it would be too late to make such a motion at *nisi prius*. (Paine v. Bustin, 1 Starkie, N. P. C. 747.

(*v*) See Note 870, p. 1238. (*w*) See Note 881, p. 1240.

Secondary evidence of writings.

great punctuality,) was admissible evidence of the contents of the letter in question. (1) "The rules of evidence," said Lord Ellenborough, "must expand according to the exigencies of society; this entry is reasonable evidence to prove the contents of the letter of the particular date, which the defendant acknowledges he received, and which he does not produce upon a notice for that purpose: we know, it is the habit of merchants to keep such a book, and a witness has sworn, that the book in question was kept with great punctuality; if the entry in the clerk's hand-writing were not admitted, there would be no way, in which the most careful merchant could prove the contents of a letter after the death of his entering clerk. I will therefore allow," added Lord Ellenborough, "the entry to be read as *prima facie* evidence, and the defendant may rebut it by producing the original."(*x*)

Secondary evidence of ancient writing.

The case of Bullen v. Michel, (2) which has been lately determined, affords an example respecting the admissibility of secondary evidence of ancient documents. In that case, on an issue to try, whether a particular farm in the parish of S. was discharged of tithes on payment of a modus, the Court of Exchequer determined, that an old ledger or chartulary of the abbey of Glastonbury was admissible, as secondary evidence of the endowment of the vicarage. Two questions arose, one with respect to the custody, from which this document was produced, which will be afterwards mentioned; the other, (supposing it to have been sufficiently authenticated as to the propriety of its custody,) whether it could be admitted in evidence between the parties to the issue, the vicar and the occupiers of the farm. With respect to this it appeared, that the chartulary contained an account of matters of a miscellaneous description; among other things, it contained entries, which appeared to be transcripts of contemporaneous documents considered as authentic: and these transcripts purported to give an account of the licence

(1) Pritt v. Fairclough, 3 Campb. 305, by Lord Ellenborough. See also Roberts v Bradshaw, 1 Starkie, N. P. C. 28. In Lord Melville's case, (29 Howell, St. Tr. 734—740,) an entry of a power of attorney, in the office-books at the exchequer, was adjudged to be evidence of the contents of the power, after reasonable proof of the loss of the original. Vide supra, p. 453.

(2) 2 Price, 399. Judgment affirmed in the House of Lords, 4 Dow. 298. Wolley v. Brownhill, 13 Price, 507, 503.

(*x*) See Note 872, p 1212.

Secondary evidence of writings.

of appropriation of the parish, and likewise an account of the several matters of endowment. The original endowment not being found in the places, where search had been made for it as its natural place of deposit, the Court held that the chartulary, which had been found in the custody of the Marquis of Bath, (and which must, therefore, be considered as having come from the custody of the rector, for the abbot was formerly the rector,) was admissible evidence. (1) The plaintiff appealed from this judgment to the House of Lords, who affirmed the judgment of the Court of Exchequer. Lord Redesdale, in giving his opinion on that occasion, stated, (2) "that the original instruments, if they could have been produced, would have stood on the same ground as the taxation of Pope Nicholas, inquisitions on the writ of *ad quod damnum*, and a variety of similar evidence from which the jury may draw their inference. The only question then is, whether the entries in this book are evidence of these two instruments. If the originals could be produced, these entries would not be evidence. But search has been made, and the originals cannot be found; and if we shut our eyes to that sort of inferior evidence in cases where no other can be had, we shall constantly do injustice. The best evidence is often lost through carelessness, the injuries of time, and various other circumstances; and secondary evidence is then admitted, to raise presumption or inference, where no direct evidence can be had. This then is the next best evidence; and perhaps evidence still more inferior might have been admitted, if this could not have been produced. This, however, appears to be the best after the originals. For these two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, because it was important for the interests of the abbey, that the instruments should be preserved; and for the same reason it might be presumed, that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept."

(1) Wood B. differed from the rest of the Court on this point. And see 13 Price, 508.

(2) 5 Dow. 324. 2 Price, 399.

Copy of enrolment of deed.

There has been some difference of opinion on the subject of the admissibility of examined copies of the enrolment of a deed. The Ch. B. Gilbert makes the following distinctions on this subject: "Where a deed needs enrolment," he says, (as deeds of bargain and sale, by statute 27 Henry VIII. c. 16.) "there the enrolment is the sign of the lawful execution of such deed, and the officer, appointed to authenticate such deeds by enrolment, is also empowered to take care of the fairness and legality of such deeds, and therefore a copy of such enrolment must be sufficient; for when the law has appointed them to be made public acts, the copy of such public acts shall be a sufficient attestation." (1) "But where a deed needs no enrolment, (continues Ch. B. Gilbert,) there, though it be enrolled, the *inspeximus* of such enrolment is not evidence, because, since the officer has no authority to enrol them, such enrolment cannot make them public acts, and consequently cannot entitle the copy of them to be given in evidence; for then, if the deed were doubtful, it were but to enrol it, and bring the copy or *inspeximus* in evidence, and thereby avoid producing a deed that was any way suspicious." (2)

Mr. Justice Buller, after citing the rule from Chief Baron Gilbert, (that deeds of bargain and sale, enrolled and requiring enrolment, may be given in evidence without proof of the execution,) observes, (3) that "the law may well be doubted, notwithstanding that such deeds of bargain and sale enrolled have frequently in trials at *nisi prius* been given in evidence without being proved. In support of this practice," he adds, "the case of Smartle v. Williams (4) is much relied on; but that case is wrong reported, for it appears from the report in Levinz, (5) that the acknowledgement was by the bargainor, and so it is stated in Salkeld's manuscript; besides, it appears from both the books, that it was only a term that passed, and consequently it was not an enrolment within the statute." Mr. Justice Buller then cites a case from Styles's Reports, (6) where

(1) Gilb. Ev. 86. Baikie v. Chandless, 3 Campb. 21. Garrick v. Williams, 3 Taunt. 544. Taylor v. Jones, 1 Ld. Raym. 746. 1 Keb. 117. 1 Salk. 280.

(2) Gilb Ev. 86. 1 Keb. 117.

(3) Bull. N. P. 256.

(4) 1 Salk. 280.

(5) 3 Lev. 387. S. C.

(6) Thurle v. Madison, Styl. 462.

Copy of enrolment.

Glyn C. J. is reported to have said, that, "if divers persons seal a deed, and but one of them acknowledge the deed, and the deed is thereupon enrolled, this is a good enrolment, and may be given in evidence at a trial, as a deed enrolled. "But it would "be of very mischievous consequence," observes Mr. Justice Buller, "to say, therefore, that a deed, enrolled upon the ac- "knowledgment of a bare trustee, might be given in evidence "against the real owner of the land, without proving it executed "by him. However, that has been the general opinion, and it "seems fortified in some degree by statute 10 Anne, c. 18. On "the other hand, it seems as absurd to say, that a release, which "has been enrolled upon the acknowledgment of the releasor, "shall not be admitted in evidence against him, without being "proved to be executed, because such release does not need "enrolment: and in fact such deeds have often been admitted: "and that was the case of Smartle v. Williams; the deed there "did not need enrolment yet, being enrolled on the acknow- "ledgment of the bargainor, it was read against him without be- "ing proved."

Bargain and sale of term.

In the case of Smartle v. Williams, an examined copy of the enrolment of a deed of bargain and sale, by which a term of years was assigned, was offered in evidence without any proof of the bargainor's sealing and delivery. It was objected, that the copy of the deed enrolled was not evidence, because the interest assigned, being only a term, passed immediately, and the enrolment afterwards is no more than an enrolment of an obligation: but the Court over-ruled this objection, and held, that "the acknowledgment of the deed by the lessor before the master in Chancery is good evidence against himself, and against all who claim under him." (1) So, in the case of Lady Holcroft v. Smith, (2) a distinction was made between deeds of bargain and sale (enrolled in pursuance of the statute of Henry VIII.), and other deeds enrolled, and it was held, that a copy of a deed, enrolled for safe custody, would not be evidence otherwise than against the party who sealed it, and all claiming under him. It does not appear from any of the authorities cited by the Chief

(1) 3 Lev. 387. Com. Dig. tit. Evidence, (B. 1.)

(2) 2 Freeman, 259.

Baron Gilbert, (excepting the case of Smartle v. Williams,) against what party the copy of the enrolment was offered in evidence. If the enrolment had been on the acknowledgment of the bargainor, and offered as evidence against him, there cannot be a doubt of its being admissible. Copy of enrolment.

With regard to a copy of the enrolment of a deed of bargain and sale, indented and enrolled in pursuance of the statute of Henry VIII., it is enacted by statute 10 Anne, c. 18. s. 3. (1) "(which was passed for supplying a failure in pleading or deriving title to lands, &c. conveyed by such deeds of bargain and sale, *where the original indentures are wanting*, as often happens, especially where divers lands, &c. are comprised in the same indenture, and afterwards derived to different persons,) that, where any such indenture of bargain and sale enrolled shall be pleaded with a profert, the party so pleading may show forth and produce a copy of the enrolment; and such copy, examined with the enrolment, and signed by the proper officer, having the custody of the enrolment, and proved upon oath to be a true copy, shall be of the same force and effect as the indenture of bargain and sale would be, if produced." Before this statute, an enrolment of the deed could not have been pleaded; and though a deed had been exemplified under the great seal, yet it was necessary, at common law, to show forth the deed itself under seal, and not the exemplification. (2) So, by the common law, a *constat* or *inspeximus* of the king's letters patent could not have been shown forth in court, but the letters patent themselves; but the statute 3 & 4 Ed. VI. c. 4., explained by stat. 13 Eliz. c. 6., "patentees, and persons claiming under them, may make title in pleading by showing forth an exemplification of the enrolment of the letters patent, as if the letters patent themselves were pleaded and shown forth;" and now they are to be given in evidence, in the same manner as if they were pleaded. (3) Bargain and sale of freehold.

The rule concerning copies of enrolments appears then to be, that an examined copy of the enrolment of a bargain and sale of freehold in lands, pursuant to the statute of Henry VIII., is

(1) See also stat. 8 G. 2. c. 6. s. 22., concerning deeds of bargain and sale of lands, in the North Riding of Yorkshire.

(2) Co. Litt. 225. *b*.

(3) Olive v. Gwyn, Hardr. 119.

Copy of enrolment.

as good evidence as an examined copy of the original itself; and where the original is wanting, (as where it has been lost or destroyed, or where different parcels of land are comprised in the same indenture and afterwards derived to different persons,) (1) a copy of the enrolment signed by the proper officer, who has the custody of the enrolment, and proved by oath to be a true copy, will have the same force and effect as the original itself would have, if produced. (2) (*y*) But a copy of the enrolment of a bargain and sale of a chattel interest, or of any other deed enrolled for safe custody, is not admissible in evidence, except as against the party acknowledging the deed, or persons claiming under him, an examined copy of the enrolment of any deed is admissible and equivalent to an examined copy of the original deed.* (*z*)

Fourthly, of the proof of execution of deeds and other writings.

Proof of execution, by subscribing witness.

The general rule is, that a deed cannot be given in evidence without proof of its execution. (*a*) The execution of every attested instrument, whether under seal or not, ought to be proved by a subscribing witness, if he can be produced, and is capable of being examined. (3) The subscribing witness alone is competent to prove the execution, because he may be able to state the time of the execution and some circumstances of

(1) See preamble of sect. 3. 10 & 11 Anne, c. 18.

(2) St. 10 Anne, c. 18. s. 3. See 14 East, 231. 1 Schoal. & Lefr. 207.

(3) This has been the rule from the earliest times. The ancient process for bringing the subscribing witness into court, is stated in Fortescue de Laud. Leg. Ang c. 32. See also Jen ins cent. p. 47. case 89.

* The enrolment of a bargain and sale under the statute of Henry the Eighth is a record; the date of the enrolment is a material part of the fact of the record, and proof, or an averment, of a different date is not admissible. (The King in aid of Reed v. Hopper, 3 Price, 495. 511.) An examined copy of the memorial of an assignment of a judgment, (the memorial being required by act of parliament,) is evidence of the fact *of the assignment;* and the attested copy of the memorial of the registry of a deed is evidence of the fact *of registry.* (Hobhouse v Hamilton, 1 Schoal. & Lefr. 257.) An examined copy of the enrolment of the memorial of an annuity-deed is evidence of the contents of the original memorial, against a defendant, who prepared and carried the memorial to be enrolled. (Baikie v. Chandless, 3 Campb. 20. Action against an attorney for negligence in respect to a memorial of annuity.)

(*y*) See Note 873, p. 1243. (*z*) See Note 874, p. 1243. (*a*) See Note 875, p. 1261.

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the transaction, which may be material and unknown to other persons. On an indictment therefore against an apprentice for enlisting himself in the army, all the judges held, that the indenture of apprenticeship could not be proved by the master, but that it was necessary to call one of the subscribing witnesses. (1) (*b*)

This rule is so strictly observed, that an acknowledgment of the obligor himself, admitting that he executed a bond, (2) and even an admission by the defendant in an answer to a bill filed against him for a discovery, (3) will not dispense with the testimony of the subscribing witness; for though the party may acknowledge the bond, yet he may not know every circumstance attending the execution; "a fact may be known to the subscribing witness, not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction." (4) (*c*) The rule is precisely the same, whether the acknowledgment is offered as evidence against the party himself who made it, (5) or against a third person; (6) or whether the deed is an existing instrument or cancelled; (7) or whether it is the foundation of the action, or comes in collaterally as part of the evidence in the cause. (8) (*d*)

Instruments not under seal.

The same rule applies equally to all written instruments, which are attested. Attested notices to quit, (9) attested warrants to distrain, (10) attested bills of exchange or promissory notes, are to be proved by the attesting witness; and in the case of a notice to quit, the circumstance that the party upon whom

(1) R. v. Jones, East, P. C. 822. 1 Leach, Cr. C. 208. S. C. R. v. Harringworth, 4 Maule & Selw. 350.

(2) Abbot v. Plumbe, 1 Doug. 216, cited by Lawrence, J., 7 T. R. 267, and 2 East, 187. In an action of covenant, payment of money into court, on one of the breaches, is an admission by the defendant, which dispenses with proof of the execution of the deed, although one of the pleas pleaded in the plea of *non est factum*. Randall v. Lynch, 2 Campb. 357.

(3) Call v. Dunning, 4 East, 53. See Bowle and another, Assignees of Jones v Langworthy, 5 T. R. 366; and as to the case of R. v. Middlezoy, on the authority of which that case was determined, vide supra, p. 448.

(4) Le Blanc J. 4 East, 53.

(5) 4 East, 53.

(6) 1 Dougl. 216.

(7) Breton v. Cope, Peake, N. P. C. 30.

(8) Manners, q t. v. Postan, 4 Esp. N. P. C. 239.

(9) Doe, dem. Sykes v. Durnford, 2 Maule & Selw. 62.

(10) Higgs v. Dixon, 2 Starkie, N. P. C. 180.

(*b*) See Note 876, p. 1261 (*c*) See Note 877, p. 1263. (*d*) See Note 878, p. 1263.

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the notice was served, read the notice, and made no objection to it, cannot vary the rule. (1) (*e*) In all these cases, the attesting witness ought to be called to prove the execution, if he can be produced. If, indeed, the attorney to a party to the suit admit the execution of the instrument, or agree that the other party should act upon the instrument, as if the witness himself had been produced, or if he admit merely the hand-writing of the subscribing witness, such admission would dispense with the testimony of the subscribing witness. (2) (*f*)

Attesting witness incompetent.

If a deed is attested by a single witness, and that attesting witness is disqualified by interest from proving its execution, (not having been, at the time of the execution, incompetent to attest,) the execution is to be proved by proof of the signature of the attesting witness. (3) (*g*) But the other party cannot object to an attesting witness, as incompetent on the ground of interest, after having requested him to attest the execution, with full knowledge of the situation in which he stood. (4)

Execution under power.

The subscribing witness is to prove the delivery of the deed, or if the writing is not under seal, the hand-writing of the party. If the person, who signed the instrument, signed it for another under a power of attorney, the power ought regularly to be produced and proved. (5)(*h*) It is not absolutely necessary that the witness should see the party sign or seal: if he sees him deliver it already signed and sealed, or merely sealed, as his own deed, it will be sufficient. Nor will it be necessary for him to prove, that blanks, which had been left in the instrument for the purpose of being filled up, were filled up at the time of the execution. (6) Some evidence of the identity of the party, who executed, is obviously necessary. (7)

Signing.

Signing is not an essential part of a deed at common law;

(1) 2 Maule & Selw. 62.
(2) Laing v. Raine, 2 Bos. & Pull. 85. Goldie v. Shuttleworth, 1 Campb. 70. Young v. Wright, 1 Campb. 140. Milward v. Temple, 1 Campb. 375.
(3) Vide infra, p. 474.
(4) Honeywood v. Peacock, 3 Campb. 196.
(5) Johnson v. Mason, 304. 1 Esp. N. P. C. 89, 116.
(6) England v. Roper, 1 Starkie, N. P. C. 304.
(7) Bull. N. P. 171. Middleton v. Sandford, 4 Campb. 34. Nelson v. Whittal, 1 Barn. & Ald. 20. Parkins v. Hawkshaw, 2 Starkie, N. P. C. 239.

(*e*) See Note 879, p. 1265. (*f*) See Note 880, p. 1265. (*g*) See Note 881, p. 1265 (*h*) See Note 882, p. 1268.

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but it has been required in some cases by act of parliament, and is often requisite for the due execution of powers. In such cases, therefore, signing is as necessary as sealing. (*i*)

Sealing.

Sealing is essential to a deed; but it is not material with what seal it is sealed. (*j*) Any number of parties may use the same seal. (1) If there be twenty to seal one deed, (says the author of the Touchstone,) and they all seal upon one piece of wax and with one seal, yet if they make a distinct and several prints, this is sufficient sealing, and the deed is good. (2)(*k*) Or one may seal for the rest with their consent, and the deed will be as binding, as if every one had put his several seal. (3) Thus, where one of two defendants, in the presence of the other and by his authority, executed a bill of sale for them both, the two defendants being partners in the transaction, but there was only one seal, and it did not appear, whether the seal had been put twice upon the wax, the Court of King's Bench held that no particular mode of delivery was necessary; and that it was sufficient, if a party executing a deed treated it as his own. The report adds, that the Court relied principally on the circumstance, that the deed had been executed by one defendant for himself and the other, in the presence of the other. (4)(*l*) If a bond, executed abroad, is declared upon in the usual form, as a deed made and sealed by the defendant, and the instrument on being produced appears not to have a seal, but instead of it a pen-mark of a particular kind, evidence is admissible to show, that it is the custom of the country to execute bonds in this manner. (5)(*m*)

Delivery of deed.

With regard to the delivery of a deed, no particular form or ceremony is necessary; it will be sufficient, if a party testifies his intention in any manner, whether by action or by word, to deliver or put it into the possession of the other party; as, if a party throw the deed upon a table, with the intent that it may be taken by the other, who accordingly takes it; or, if a stranger

(1) Perkins, ch. 2, s. 135. Sheph. Touch. 55. Com. Dig. tit. Fait. (A 2.)
(2) Touchst. ch. 4, p. 55. Fitzh. tit. Feoffment, pl. 105.
(3) 4 T. R. 314.
(4) Ball v. Dunsterville and another, 4 T. R. 313.
(5) Adam v. Kerr, 1 Bos. & Pull. 360.

(*i*) See Note 883, p. 1269. (*j*) See Note 884, p. 1277. (*k*) See Note 885, p. 1280. (*l*) See Note 886, p. 1281. (*m*) See Note 887, p. 1281.

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deliver it with the assent of the party to the deed. (1)(*n*) If the deed is made by a corporation, actual delivery is not required;

Corporation.

and fixing the common seal, that is the corporate seal, or any other used for the occasion, (2) is tantamount to a delivery; (*o*) but if the corporate body has given a letter of attorney to deliver, the deed is not theirs until delivered. (3)

It has been before mentioned, that proof of delivery, without any proof of signing or sealing, will be sufficient evidence of execution; for the party, by delivering a deed purporting to be his own, adopts the seal and the signature. But, under particular circumstances, less evidence has been admitted to prove the execution. It appeared, in one case, that the defendant, a few minutes after having executed the deed, brought it to the witness in an adjoining room, and desired him to attest it; another attesting witness was still in the room, where the deed had been executed; and it was further proved, that the witness was acquainted with the defendant's handwriting, and that the defendant knew of his being acquainted with it; and that the defendant had acknowledged the instrument; but there was no proof of the act of delivery, and no reason was shown, why the other attesting witness could not be called to prove the delivery; in this case the Court of Common Pleas was of opinion that the whole might be considered as one transaction, and that there was sufficient proof of the execution. (4)

Execution of powers.

The distinction between execution of deeds at common law, and executions under powers, is fully established. It is a well-known rule, that all the formalities and circumstances, prescribed by a power, are to be strictly observed. If a particular number of attesting witnesses is required, there must be that number. If they are to attest in a particular form, that form must be followed, and they must attest every thing that is necessary for the execution of the power. The following are the latest cases that have been determined upon this subject. (5)(*p*)

(1) Thoroughgood's case, 9 Rep. 137, a. Com. Dig. tit. Evidence, (A. 3.) Co. Litt. 336, a. [Note 223.] 2 Barn. & Cress 82.

(2) Perkins, c. 2, s. 132.

(3) Co. Litt. 36, a. [Note 222.]

(4) Parke v. Mears, 2 Bos. & Pull. 217. Powel v. Blacket, 1 Esp. N. P. C. 96. Grellier v. Neale, Peake, N. P. C. 146.

(5) This subject is fully considered in Sugden's Treatise on Powers.

(*n*) See Note 888, p. 1281. (*o*) See Note 889, p. 1286. (*p*) See Note 890, p. 1287.

Proof of execution.

Attestation of signature.

In the case of Wright v. Wakeford, (1) where a power was created, to be executed by trustees, with the consent of the *cestui que trusts* testified by *writing under their hands and seals, attested by two or more credible witnesses*, but the attestation expressed only, that the deed had been *sealed and delivered* by the *cestui que trusts* and the other parties in presence of the subscribing witnesses, the majority of the Court of Common Pleas determined, that the power had not been duly executed; for the question is to be determined by the true construction of the terms of the attestation, and by that alone; and the word "sealed," according to its true acceptation and ordinary sense, cannot be considered as implying that the parties who put their seals to the instrument, put also their hands to it, or signed it in the presence of the witnesses. It was further determined in this case (2), that a subsequent attestation, indorsed upon the instrument after the death of one of the *cestui que trusts*, and expressing that the parties had also signed in the presence of the subscribing witnesses, would not cure the original defect; on the ground, that the attestation, to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing, such being the usual and common way of attesting the execution of all instruments requiring attestation.

In the late case also of Doe, on the demise of Mansfield v. Peach, (3)* where the power was directed to be executed "by

(1) 4 Taunt. 214; Mansfield C. J. dissenting. 7 Taunt. 361. 17 Ves. 454, S. C.

(2) See also 17 Ves. 457.

(3) 2 Maule & Selw. 576. Wright, v. Barlow, 3 Maule & Selw. 512 S. P.

* In consequence of the decision in the cases of Wright v. Wakeford, and Mansfield v. Peach (which might affect the titles of purchasers, in case the fact of signature were not expressed in the memorandum of attestation,) an act of parliament was passed, (*a*) which enacts, "that every deed or other instrument, already made with the intention to exercise any power, authority, trust, or to signify the consent or direction of any person, whose consent or direction may be necessary to be so signified, shall, if duly signed and executed, and in other respects duly attested, be (from the date thereof, and so as to establish derivative titles,) of the same validity and effect, and proveable in the like manner, as if a memorandum of attestation of signature, or of being under hand, had been subscribed by the witness; and the attestation, expressing the fact of sealing and delivering, without expressing the fact of signing or any other form of attestation, shall not exclude the proof or the presumption of signature." This statute, it is to be observed, is only retrospective.

(*a*) St. 54 G. 3, c. 168.

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any *deed or writing under the hands and seals* of the parties, to be by them duly executed in the presence of, and *attested by two or more witnesses*," and the attestation was only of the sealing and delivery, the Court of King's Bench were of opinion, that, in order to make a due execution of the power in this case, the instrument ought to have been made with all the forms required by the power, and that there ought also to have been an attestation of its execution with all those forms; and with respect to the second point, which arose here as well as in the case of Wright v. Wakeford, the Court said, it was not necessary to determine, at what precise time the attestation should be made, but that the attestation, subsequent to the death of one of the parties, could not give to their act an operation, which it never had during the lives of the parties.

In another case, where lands were limited to such uses, as the donee should direct by deed or writing, *under his hand and seal attested* by two or more credible witnesses, the Court of Common Pleas determined, that the power was not effectually executed by a will, signed and sealed, but attested by the subscribing witnesses as being *signed* in their presence, without noticing the sealing; nor could the defect be cured, by calling on one of the witnesses to prove, that the will was actually *sealed* in their presence, as well as signed (1).

In the case of Moodie v. Reid,(2) the same court determined, that a power, to be executed by a writing signed and published in the presence of attesting witnesses, is not properly executed by an attestation, which notices the signing only, and not the publication. The question in that case arose on a marriage-settlement, which contained a power to limit the uses of money in the funds, by any writing or appointment in the nature of a will, *to be signed and published in the presence of, and attested by two or more credible witnesses;* the testatrix at the close of her will signed her name, and two names were subscribed under the word "witness;" the subscribing witnesses proved that the testatrix signed in their presence, and that they understood, from what the testatrix said at the time of signing,

(1) Doe dem Hotchkiss v. Pearce, 6 Taunt. 402. 2 Marshall, 102, S. C.

(2) 7 Taunt. 355.

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that the paper was her last will. The Court of Common Pleas held, on a case directed for their opinion by the Vice Chancellor, that the power had not been properly executed. Lord Ch. Justice Gibbs said, " A will, as such, requires no publication; but here the power is to be exercised by a will signed and published; there must be some publication here; the will must be signed, published, and attested; there must therefore be some attestation of signing and publication. After adverting to the difficulty of defining the term " *publication*," as applied to a will, the Lord Chief Justice added, " I can only suppose it to be that, by which a person designates, that he means to give effect to a paper as his will."

Where, however, the deed, by which the power was created, directed, not that the instrument should be *attested* by witnesses, but that the power should be executed by *any writing to be signed and sealed in the presence of two or more witnesses*, and the deed, in pursuance of the power was expressed to be executed in the presence of the witnesses, but the attestation applied only to the sealing and delivery, the Chancellor was of opinion, that in such a case it might be properly left to the jury to presume, that the deed was signed, as it professed to be, in the presence of the witnesses, who attested the sealing and delivery. (1)

Several parties —one seal.

The rule which has been before mentioned, respecting the sealing by several parties on one piece of wax, and with one seal, is applicable to all deeds at common law; and such sealing will bind the parties by whose authority the deed is executed. But this rule does not extend to warrants or orders executed under a power. In a case lately determined by the Court of King's Bench, (2) where the question was, whether a certificate, signed by two churchwardens and one overseer, but bearing only two seals, was a legal and valid certificate under the stat. 8 & 9 W. 3. c. 30, (which requires certificates to be under the hands and seals of the church wardens and overseers, or the major part of them, or under the hands and seals of the overseers, where there are no church-wardens,) the Court determined, that the certificate had not been properly executed. The facts of the

Certificate of settlement.

(1) M'Queen v. Farquhar, 11 Ves. 467. 17 Ves. 458.

(2) R. v. Austrey, Easter Term, 1817, Maule & Selw. MS.

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case were shortly these. The certificate was duly attested, and allowed by magistrates, and purported to be the certificate of A. B. and C. D. churchwardens, and of E. F. overseer; one seal was opposite to the two first names, and the other seal opposite to the last; no trace of any other seal appeared on the instrument, and the certificate was above thirty years old. Lord Ellenborough C. J., in delivering the judgment of the Court, said, "In considering how far the cases of deeds are applicable to the present, it is to be recollected, that in those cases the parties alone, under whose authority the deeds were executed, are bound by them. But the present is the case of the execution of a power, which binds and operates upon other persons at their peril, and subjects them to indictments as for crimes, in case of their disobedience to the power, if it be duly executed. In the execution of powers, all the circumstances required by the creators of the power, however unessential and otherwise unimportant, must be observed, and can only be satisfied by a strictly literal and precise performance. (1) It is also a general principle of law, wherever a power is given to particular persons, to do a written act in a particular manner or under certain particular circumstances, whether it be to parish officers or magistrates, (as, to grant certificates, under which, if duly executed, other persons, especially public officers, are bound to act—or to grant warrants, or make order,) that their authority must appear upon the instrument itself. It must thereby appear, that they are the persons authorized, and that the certificate, warrant, or order, was made in the manner and under the circumstances required. Otherwise the certificate, warrant, or order, is not obligatory, but void.(*q*) The statute is to be construed, in a case like this, according to common parlance and understanding, and so as to be a security to persons, who are bound to obey the powers given by it at their peril; and it is not to be construed according to what may be brought within its words by nice legal reasoning, applicable merely to deeds. In the case of Thaire v. Thaire, (2) where there was a submission to arbitration, 'so that the award be delivered under their hands and seals,' it was made a question, whether an award, sealed but not signed, was a good award; the point reserved being,

(1) See Hawkins v. Kemp, 3 East, 440. (2) Palmer, 109, 112.

(*q*) See Note 891, p. 1287.

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whether the sealing, which was virtually a signing, was sufficient, or whether the words of the submission should be intended, in common parlance, an actual writing of their hands. The Judges of the Court of Common Pleas, were at first divided in opinion on that point. It was finally decided, however, by the whole Court, that a virtual signing would not do, but that there ought to be an actual signing under their hands. So in the present case," said Lord Ellenborough, "where an act is to be under the hands and seals of the three, a mere virtual sealing by any of the three appears to us not sufficient; but it ought to be under the actual distinct seal of each, that is to say, under a distinct and several sealed impression adopted by each of the parties." (*r*)

Proof of hand-writing of subscribing witness.

If a deed or other written instrument is attested, but none of the witnesses are capable of being examined, the course then is to prove an attesting witness's hand-writing; and this will be a sufficient proof of the execution; as, where the attesting witness is dead—or blind (1) (*s*)—or incompetent to give evidence, either from insanity, (2) or from infamy of character, (3) or from interest acquired after the execution of the deed, (4) (*t*)—or where the subscribing witness is absent in a foreign country, (5) or out of the jurisdiction of the superior English courts, so as not to be amenable to their process, (6)—or where he cannot be found after strict and diligent enquiry. (7)* (*u*) Illness is not

(1) Wood v. Drury, 1 Ld. Raym. 734, by Holt C. J.

(2) Vin. Abr. tit. Evidence, (T. b. 48.) pl. 12. Burnett v. Taylor, 9 Ves. 381. Currie v. Child, 3 Campb. 283.

(3) Jones v. Mason, 2 Stra. 833. Com. Dig. tit. Testmoigne, B. 3.

(4) Goss v. Tracy, 1 P. Wms. 287. 289. Godfrey v. Norris, 1 Stra. 34. Swire v. Bell, 5 T. R. 371. Buckley v. Smith, 2 Esp. N. P. 697. See Honeywood v. Peacock, infra., p. 476.

(5) Coghlan v. Williamson, 1 Doug. 93. Wallis v. Delancey, 7 T. R. 266. (c,) Adam v. Kerr, 1 Bos. & Pull. 361.

(6) Prince v. Blackburn, 2 East, 250. 1 Bos. & Pull. 361. Ward v. Wells, 1 Taunt. 161. Hodnett v. Forman, 1 Starkie, N. P. C. 90.

(7) Anon. case, 12 Mod. 607., by Holt C. J. 7 T. R. 266. Cunliffe v. Sefton, 2 East, 183. Crosby v. Percy, 1 Taunt. 365. Parker v. Hoskins, 2 Taunt. 223. Wardel v. Fermor, 2 Camph. 282. Burt v. Walker, 4 Barn. & Ald. 697.

* In the case of Cunliffe v. Sefton (2 East, 183.,) it was proved, that diligent enquiry had been made after one of the attesting witnesses to a bond at the residence of the obligor and obligee, without being able to obtain any intelligence of such a person; this was considered a sufficient ground for letting in proof of the hand-writing of the other attesting witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the

(*r*) See Note 892, p. 1293. (*s*) See Note 893, p. 1293. (*t*) See Note 894, p. 1293. (*u*) See Note 895, p. 1293.

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a sufficient reason for dispensing with the attendance of a subscribing witness: such a relaxation of the rule has not yet been made, and it would obviously be liable to great abuse. (1) (*v*)

The proof of the subscribing witness's hand-writing, in the cases above mentioned, is evidence of the execution of the instrument by the party therein named: the sealing and delivery will be presumed; and, for the purpose of proving the execution, it will not be necessary to prove also the hand-writing of the party. (2)* (*w*) With a view, indeed, to establish the

(1) Harrison v. Blades, 3 Campb. 458., by Lord Ellenborough. The receipts of a tax-gatherer were offered in evidence, and as he was at the point of death, it was proposed to prove his hand-writing. See Jones v. Brewer, 4 Taunt. 47.

(2) Prince v. Blackburn, 2 East, 250. Adam v. Kerr, 1 Bos. & Pull. 360. Milward v. Temple, 1 Campb. 375. Gough v. Cecil, 1 Selw. N. P. 516., cited from MS. In the case of Wallis v. Delancy, 7 T. R. 266. n. (*c*) Lord Kenyon held, that the proof of the hand-writing of one of the subscribing witnesses, who was abroad, was not sufficient, in an action upon a bond, and that the hand-writing of the obligor should also be proved. Such additional proof might have been necessary in that case, to connect the defendant with the bond. This is not unlikely to have been the ground of Lord Kenyon's opinion. The note of the case is very short; and the ground is not stated.

record. In the case of Crosby v. Percy (1 Taunt. 365,) the Court of Common Pleas held, that proof of the hand-writing of an attesting witness had been properly admitted, after proof that diligent enquiry had been made for him at his usual place of residence, where, in answer to the enquiry, information was received, as also from the father of the attesting witness, that he had absconded to avoid his creditors, and was not to be found. In the case of Wardel v. Fermor (2 Campb. 282,) evidence of the hand-writing was admitted, on proof that, twelve months before, a commission of bankrupt had been sued out against the subscribing witness, who had not appeared at the time fixed for his surrender. Similar evidence was admitted in the case of Parker v. Hoskins (2 Taunt. 223,) an enquiry having been made for the subscribing witness at the Admiralty, whence it appeared by the last re ort, that he was serving on board of some ship, but in what ship it was not known. And in another case, where it appeared, that one of two subscribing witnesses was dead, and the other had gone abroad as a marine, about twenty years before the trial of the cause; and the witness, who spoke to this latter fact, said, he had not heard any thing of him since; but that he had applied for information to the brother of the marine, who informed him, that he did not know where he was, whether in England or abroad; the Court of King's Bench held, that proof of this subscribing witness's hand-writing ought to have been admitted; and Lord Ellenborough said, the proof of the fact of the subscribing witness's going abroad twenty years ago (so large a portion of the life of man,) and never having been heard of since, would of itself be sufficient. The case was thought to be so clear, it was not argued on either side. Doe, dem. Johnson v. Johnson, Leicester Lent. Ass. 1818, K. B. Trin. term, June 5. It is not possible, by any general rule, to ascertain precisely in what cases this proof of the subscribing witness's hand-writing will be admitted. Each case must depend upon its own peculiar circumstances. But in all cases it ought to be satisfactorily proved, that a reasonable, honest and diligent enquiry has been made, without any evasion, and without any design to overlook the witness.

* In the case of a deed executed in the East Indies, and attested by a witness resident there, the stat. 26 G. 3, c. 57, S. 38, enacts, "that it shall be suf-

(*v*) See Note 896, p. 1299. (*w*) See Note 897, p 1299.

Proof of execution.

Identity of party.

identity of the party, that is, that the person who executed the instrument, is the party to the suit, or the party charged, proof of the party's hand-writing will be most important, and the most satisfactory evidence that can be produced. In an action on a bond, or on a promissory note or bill of exchange, some evidence of identity appears to be necessary. (1)(*x*) Proof of the witness's signature proves only this fact, that the instrument in question was executed by a person in a certain name; it does not prove the other important fact, that the defendant is that person. Some evidence seems necessary to connect the defendant with the bond or note. Proof of his signature on the instrument would be decisive. But such proof is not indispensably necessary; and much slighter evidence would, in the first instance, be sufficient. Evidence that the defendant was present, when the note was prepared by the subscribing witness, will serve to connect him with the instrument. (2)

Proof of the party's signature.

Where there is no subscribing witness on the deed; or where the subscribing witness denies having any knowledge of the execution, which is the same thing as if there were no witness at all; (3)(*y*) or where the name of a fictitious person is inserted; (4) or where the person, who has put his name as subscribing witness, did so without the knowledge or consent of the parties; (5)(*z*) or if after diligent enquiry nothing can be heard of the subscribing witness, so that he can neither be produced himself, nor his hand-writing, proved; in these cases, the execution may be proved, by proving the hand-writing of the party

(1) Nelson v. Whittal, 1 Barn. & Ald. 21. See also Memot v. Bates, Bull. N. P. 171. Middleton v. Sandford, 4 Campb. 24.

(2) Nelson v. Whittal, 1 Barn. & Ald. 19.

(3) Grellier v. Neale, Peake, N. P. C. 145., ruled by Lord Kenyon. Ley v. Ballard, 3 Esp. N. P. C. 173., by Ld. Kenyon. Fitzgerald v. Elsee, 2 Campb. 635., by Lawrence J. Lemon v. Dean, ib. 636. n. by Le Blanc J. Talbot v. Hodson, 7 Taunt. 251.— Phipps v. Parker, 1 Campb. 412. is therefore over-ruled.

(4) Fasset v. Brown, Peake, N. P. C. 23.

(5) M'Craw v. Gentry, 3 Campb. 232. 4 Taunt. 220.

ficient to prove the hand-writing of *the party to the deed*, and of the attesting witness, and that the witness is resident in the East Indies." When this statute was passed, the present rule respecting the proof of the execution of a deed had not been established.

(*x*) See Note 898, p. 1302. (*y*) See Note 899, p. 1303. (*z*) See Note 900, p. 1305.

Proof of execution.

to the deed; or by any person present at the execution, though he is not endorsed as witness; (1) or by proof of an admission of the party himself, that he executed the deed. (*a*)

In the case of Swire v. Bell, (2) the Court of King's Bench appears to have held, that when an attesting witness to a deed was interested in the provisions and object of the deed at the time of the execution, and continues so at the time of the trial, proof of his signature would not be sufficient proof of the execution. (*b*) But when the defendant himself knew of the situation in which the attesting witness stood at the time of the execution, and yet, being party to the deed, desired him to attest, it is reasonable, that he should not be allowed to object to such witness at the trial, as incompetent on the ground of interest. (3)

The proof of the party's hand-writing, in the cases before mentioned, is a sufficient ground for presuming, that the deed was, as it purports to be, sealed and delivered. (4) In the case of Talbot v. Hodson, an action on a bond, (5) the subscribing witness was first called to prove the execution, but on his denying that he saw any thing of the execution, the co-obligor was examined, having had a release to render him competent; this witness stated, that there was a seal on the bond, when the defendant wrote his name opposite, but that the defendant did not seal it in the witnesse's presence, nor put his hand to the seal, nor delivered the bond as his deed. The Lord Ch. Justice Gibbs considered the circumstance of the defendants writing his name opposite the seal on an instrument, in which it was affirmed that he sealed, was evidence of a sealing and delivery; and the

(1) Com. Dig. tit. Evidence, (B. 3.)

(2) 5 T. R. 371. This was an action on a bond, given to indemnify a township against the charge of a bastard child. The only subscribing witness was at the time of the attestation, as well as at the time of the trial, a payer and contributor to the rates of the township. On being called to prove the execution he was objected to, but admitted; and the plaintiff had a verdict. On a motion for a new trial, the Court of K. B. were of opinion, that the witness was interested and incompetent, and that the proof of his signature was not sufficient; but as it appeared that the signature of the obligor had also been proved, the rule for a new trial was refused.

(3) Honeywood v. Peacock, 3 Campb. 196.

(4) Grellier v. Neale, Peake, N. P. C. 145. Burrows v. Lock, 10 Ves. 474.

(5) 7 Taunt. 251. The jury found a verdict for the plaintiff. Both witnesses, who were called, were very near relations of the defendant.

(*a*) See Note 901, p. 1309. (*b*) See Note 902, p. 1310.

Court of Common Pleas were of opinion, that the evidence had been properly left to the jury, and that they had drawn the true conclusion.

There are some exceptions to the general rule, as to the necessity of proving the execution of deeds and other writings, which may be conveniently mentioned in this place. Exceptions.

First, if the deed is thirty years old, it may be admitted in evidence without any proof of its execution; such a deed is said to prove itself. (1) (*c*) The same rule applies generally to deeds concerning lands, to bonds, (2) receipts, (3) letters, (4) and all other ancient writings; the execution, or writing, of which need not be proved, provided they have been so acted upon, or brought from such a place, as to afford "a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. (5) (*d*) 1. Deeds, 30 years old.

If there is any blemish in the deed by rasure or interlineation, the deed ought to be proved, though above thirty years old, (6) (*e*) and the blemish satisfactorily explained. (*f*) In such a case, the jury would have to try, whether the rasure or interlineation was before or after the delivery of the deed; for, if the rasure was before that time, the deed is still valid and binding; it is only after the delivery that a rasure or interlineation can effect a deed, and even then they are in some cases immaterial. (*g*) Now, to ascertain the time of delivery, the first and best evidence to be resorted to is the testimony of a subscribing witness, if any can be produced; or, if there is no

(1) 2 Term Rep. 471. Bull. N. P. 255.

(2) Governor of Chelsea Waterworks v. Cowper, 1 Esp. N. P. C. 275.

(3) D. & Ch. of Ely v. Stewart, 2 Atk. 44. Fry v. Wood, 1 Selw. N. P. 492. Manby v. Curtis, 1 Price, 232. Bertie v. Beaumont, 2 Price, 308. Bullen v. Mitchel, 2 Price, 399. 4 Dow. 297. Sir W. W. Wynne v. Tyrwhitt, 4 Barn. & Ald. 376.

(4) In Beer v. Ward, on the trial of an issue as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the head of the family, and brought from among the title deeds kept at the family-seat, was admitted as genuine, without proof of the hand-writing by Dallas, C. J. in C. P. sitt. after Mich. T. 1821, S. P. by Lord Tenterden, K. B. sitt. after Trinity Term, 1823, on second trial.

(5) Vin. A. B. tit. Evidence, (A. b. 5.,) cited 7 East, 291. Bull. N. P. 255. Forbes v. Wale, 1 Black. 532. cited by Lord Kenyon, 1 Esp. N. P. C. 278. 4 Barn. & Ald. 376. As to the custody of old documents, see infra, p. 479.

(6) Gill. Ev. 89. Bull. N. P. 255.

(*c*) See Note 903, p. 1315. (*d*) See Note 904, p. 1316. (*e*) See Note 905, p. 1317. (*f*) See Note 906, p. 1317. (*g*) See Note 907, p. 1318.

subscribing witness, other persons may be called, who were present when the deed was delivered; (*h*) or, if no person was present, the time of delivery will be reckoned from the date of the deed. And the fact, of the rasure having been after the delivery, may be proved either by a subscribing witness, or by any other person, who saw the rasure made. (*i*)

Subscribing witness alive.

The rule, that deeds of thirty years' standing prove themselves, is so well established, that even if a subscribing witness were alive, and in a state to be produced, it has been thought unnecessary to call him for proving the execution. (*j*) Lord Kenyon is reported to have said, (1) that he remembered a case before Mr. Justice Yates, in which, a deed of that age being produced in evidence, it appeared, that the subscribing witness was then actually in court; but the Judge declared, he would not break in upon a rule of evidence so well established, by requiring the subscribing witness to be called, and admitted the deed without further proof. In the case of Rees v. Mansel, (2) indeed, Mr. Baron Perrot held, that, although a deed may be read in evidence on account of its antiquity, yet, if on the other side it is shown, that one of the witnesses is alive, he must be produced, or the deed must be rejected; and he cited a case, where a deed was produced in the King's Bench, and it appeared, that Sir Joseph Jekyll was the subscribing witness, upon which the Court said, they knew he was alive, and that if he did not come to prove it, the plaintiff must be nonsuited. It was then mentioned to have been ruled by Mr. Justice Yates, that for the sake of practice, the witness should not be allowed to prove an old deed, even if he attended for that purpose; but Mr. B. Perrot retained his opinion; "An old deed (he said) is admitted only on a presumption that the witnesses are dead, but when the contrary is made to appear, they must be called." If the rule is founded on the mere presumption of the attesting witness's death, then it seems to follow, that, where this presumption is contradicted by the fact of his being still alive, the execution of the deed ought to be regularly proved, as in ordinary cases. But if courts of law have adopted the rule, not on the single presumption of a fact (which would be for the

(1) March v. Colnett, 2 Esp. N. P. C. 665. (2) 1 Selw. N. P. 492.

(*h*) See Note 908, p. 1319. (*i*) See Note 909, p. 1319. (*j*) See Note 910. p. 1319.

consideration of the jury rather than of the Court,) but as a general maxim of law, on account of the great difficulty of proving execution after an interval of many years, and have therefore fixed a limit, beyond which a proof of execution is not to be required, there appears to be no inconsistency in acting generally upon this principle, though in a particular case the subscribing witness may be proved to be alive, at the same time leaving it to the opposite side to dispute the regularity of the execution by calling him or any other witness. Custody of old documents.

The character and authenticity of old writings depend in a great degree on the nature of the place or custody in which they have been kept. This is the case with terriers, ecclesiastical surveys, court-rolls, and other muniments of manors,—which ought to be produced each from its proper depository; and if they have been regularly preserved, it will not be necessary, after a considerable lapse of time, to prove them genuine. For the same reason, old grants to abbeys have been rejected as evidence of private right, because the possession of them did not appear to be connected with any persons, who had an interest in the estate. (1) Custody of old documents.

In a late case, a grant to an abbey, contained in a manuscript entitled "*Secretum Abbatis*" in the Bodleian library at Oxford, was rejected, as not coming from the proper custody; (2) and on the authority of this case, Mr. Justice Lawrence held, that an old grant to a priory, brought from the Cottonian manuscripts in the British museum could not be received, as it was not shown, that the possession of the grant was connected with any person, who had an interest in the estate. (3)

In the case of Bullen v. Michel, (4) one of the questions, on the admissibility of the chartulary, related to the custody, from which that old document was produced. It appeared, that the chartulary was brought from the muniment room of the Marquis of Bath, who, although not the owner of the particular farm, nor of any property in the parish of S., was the owner of other

(1) Lygon v. Strutt, 2 Anstr. 601.
(2) Michell v. Rabbets, 3 Taunt. 91.
(3) Swinnerton v. Marq. of Stafford, 3 Taunt. 91.
(4) 2 Price, 413.

Custody of old documents.

estates formerly belonging to the abbey, and concerning which estates entries were to be found in the same document; and the character of the hand-writing in the chartulary was proved to be of the reigns of the three first Edwards. "The question is," said the Lord Chief Baron Gibbs, in delivering the judgment of the Court, "whether this book appeared, from the facts attending it, to have belonged to the abbey of Glastonbury. We should recollect, that such a book, as this purports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dissolved, those estates went to the Crown, and the Crown afterwards granted them to different persons; the book, when the abbey was dissolved, would go to the officers of the Crown, and when the Crown portioned out and made over the possessions of the abbey to other persons, the book could go only to one of those grantees; and the only possible way of connecting it with the abbey is, by showing a connection between the possessor and the Crown, and by raising a probability, that the crown may have handed over the book to the present possessor." Now, such a connection was shown in the present case; for it appeared, that the present owner of the book is also the owner of certain lands, which formerly belonged to the abbey, and on the dissolution of the abbey passed to the Crown, and from the Crown to the present possessor; and the probability is, that the book attended the lands in their passage from the Crown. On this ground, therefore, the Court were of opinion, that the custody was so accounted for, as to render the book admissible in evidence.

In the case of Potts v. Durant, (1) the Court of Exchequer determined, that some ancient writings, which had been offered in evidence, were inadmissible, because they had not been brought from the proper repository. One was a writing purporting to be an endowment of a vicarage; another was an ancient writing, purporting to be un *inspeximus* of the former, under the seal of the Bishop of Norwich, and containing a copy of the former, which is stated to have been at that time in the registry of the diocese. These writings were produced at the

(1) 3 Anstr. 789.

Custody of old documents.

trial, by a person who had purchased them at a sale, as part of a private collection of manuscripts. Here the instruments came out of the custody of a private person, perfectly unconnected with the matters contained in them; and, for this reason, were adjudged to be inadmissible. In the case of Lygon v. Strutt (1) also, the Court of Exchequer held, that an ancient writing, purporting to enumerate the possessions of a monastery, which had been brought from the herald's office, was inadmissible.

The case of Earl v. Lewis (2) is another instance on this subject. There it was proved, on the trial of an issue respecting the boundaries of two adjoining parishes, that the old papers, offered in evidence on the part of the plaintiff (the rector of one of the parishes,) had come into the possession of the son of the former rector, upon his father's death, and that the son delivered them over, as papers belonging to the parish, into the hands of the witness, who produced them in court, in the same state in which he had received them; and this was held to be sufficient evidence of the authenticity of the papers. So, in the case of Jones v. Waller, (3) on a bill for tithes, a book purporting to be the book of a collector of tithes, something more than seventy years old, being in the hands of the successor of that collector, was for that reason considered authentic.

In the case of Manby v. Curtis, (4) a paper, purporting to be a receipt fifty years old, was produced as matter of evidence, to show that a man of the name of Curtas had, fifty years before, paid to a man of the name of Smith a certain sum in lieu of tithes, and in support of the authenticity of this paper, it was proved to have been delivered to the witness by the defendant; but it did not appear where the defendant got the paper, nor did it appear whether Smith was dead, or even who he was; the Court of Exchequer therefore rejected the evidence, on the ground that the paper had not been authenticated. And in the case of Randolph v. Gordon, (5) where a book, purporting to be the book of a former rector, was produced by the defendant's

(1) 2 Anstr. 601.
(2) 4 Esp. N. P. C. 1. before Heath J.
(3) 3 Gwill. 847. The evidence is said to have been received without proof of the collector's hand-writing. See 2 Jac. & Walk. 468.
(4) 1 Price, 225; Mr. Baron Wood dissenting. 2 Jac. & Walk. 480.
(5) 5 Price, 312.

Custody of old documents.

attorney, who received it from the defendant, and the defendant was the grandson of the former rector; but it did not appear whether he had found the book among his grandfather's papers, or how it came into his possession, the Lord Chief Baron held, that the book was not admissible.

In the case of Bertie v. Beaumont (1) the question was whether a paper, which on the face of it contained evidence of money-payments in lieu of the tithes enumerated in it, was admissible, to show that a Dr. Eyre, who was clearly at the time rector, and had been so for many years preceding, and had received customary payments (there being also negative evidence that no payments of tithes in kind had been ever made,) had given such receipt, and thereby acknowledged such payments. This paper was produced by the defendant's solicitor, who stated, that he received it from the defendant for the purpose of preparing his defence. It was not given to the defendant, but to another person of the same name, and who of course occupied lands in the parish, for none but an occupier could have acquired such a receipt. The Lord Chief Baron Thompson said, "That person being of the same name with the present defendant, there is a reasonable inference, that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient." It was objected, also, that the hand-writing of the paper had not been proved;" "but," said the Chief Baron, "I do not think that any such proof was necessary to establish a document of this sort, at such a distance of time, any more than it would have been necessary to prove a deed of the same date."

The rule, respecting the proof of the custody in which documents have been kept, applies more particularly to ancient documents, whose authenticity depends, in some degree, upon their custody, and which must be shown to be connected with the party who produces them. In common cases, where the written instrument itself purports to belong to the party who produces it in evidence, no proof can be requisite as to the place in which it has been kept. On a question of settlement, where the re-

(1) 2 Price, 307.

Custody of old documents.

spondents produced a certificate more than thirty years old, purporting to be granted to their parish by the appellant parish, the mere production of it was held to be sufficient, and the respondents were not obliged to show that the certificate had been kept in the parish chest; (1) and it would be sufficient, if the certificate were to be produced by a rated inhabitant of the parish. (2)(*k*) So in an action for a false return to a mandamus a corporator may produce the muniments of the corporation. (3) It has been before mentioned, that if a witness is called merely to produce an instrument, he need not be sworn for that purpose. (4)

2. Deed produced by rule of court.

A deed may be given in evidence, under a rule of court, without proof of execution; for the consent is conclusive, and the jury are to try only such facts as are in issue between the parties. (5)

3. Deed produced by the other party.

When a deed, or written agreement, comes out of the possession of the opposite party, who produces it in pursuance of a notice, and who derives a beneficial interest under it, the execution need not be proved; (6) nor will proof of the execution of a deed be necessery, where the opposite party who produces the deed is a public officer, who, in the discharge of his official duties, was obliged to prepare such deed, and have it duly executed. (7)(*l*)

Fifthly, of the proof of hand-writing in general.

Proof of hand-writing.

The simplest and most obvious proof of hand-writing is the testimony of a witness, who saw the paper or signature actually written. But a great variety of cases must continually occur, where such a direct kind of evidence cannot possibly be procured. The writing may be secret, as must constantly happen

(1) R. v Ryton, 5 T. R. 259.
(2) R. v. Netherthong, 2 Maule & Selw. 337. This was before the late act of parliament, which made rated inhabitants competent witnesses on the trial of an appeal.
(3) 2 Maule & Selw. 338.
(4) See ante, p. 274.
(5) 1 Siderf. 269. Gilb. Ev. 91. Bull. N. P. 256.
(6) See Pearce v. Hooper, and Orr v. Morice, ante, p. 449, 450.
(7) Scott v. Waithman, 3 Stark. N. P. C. 168. Barnes v. Lucas, Ry. & Mo. N. P. C. 264. S. P.

(*k*) See Note 911, p. 1319. (*l*) See Note 912, p. 1320.

Proof of hand-writing.

in cases of a fraudulent or criminal nature; or, if any person was present, he may be dead or unknown. In this deficiency of positive proof, the best evidence, which the nature of the case admits, is the information of witnesses acquainted with the supposed writer, who, from seeing him write, have acquired a knowledge of his hand-writing: for in every person's manner of writing there is a certain distinct prevailing character, which may be easily discovered by observation, and, when once known, may be afterwards applied as a standard to try any other specimens of writing, whose genuineness is disputed. A witness may therefore be asked, whether he has seen a particular person write, and afterwards, whether he believes the paper in dispute to be his hand-writing. This course of examination evidently involves two questions; first, whether the supposed writer is the person of whom the witness speaks; and, secondly, if he is the person, whether he wrote the paper in dispute. The first is a question of identity; the second a question of judgment, or a comparison, in the mind of the witness, between the general standard and the writing produced.

1. Proof by witnesses, who have seen the party write.

This kind of evidence, like all probable evidence, admits of every possible degree from the lowest presumption to the highest moral certainty. It may be so weak, as to be utterly unsafe to act upon; or so strong, as in the mind of any reasonable man to produce conviction. The witness may have been in the constant habit of seeing the person write, day after day, for years together, on common transactions, and in the course of important business; and what better means can he have of gaining the most accurate knowledge of his manner of writing? On the other hand, it may be found, perhaps on enquiry, that he has seen him write only a few words, many years ago, or only once; or the specimens, which he saw, were perhaps, slight and imperfect, made in a hurry, at distant intervals, or, from some other cause, were not the fair average specimens of his general style of writing, but deviations from the common form; in which cases, the impression on the mind of the witness would be faint and inaccurate. But whatever degree of weight his testimony may deserve, which is a question exclusively for the

jury it is an established rule, that, if he has seen the person write, he will be competent to speak to his hand-writing.(1)(*m*) Proof of hand-writing.

On the trial of Algernon Sydney, as appears from the printed report of that case, (2) three witnesses were called to prove a paper to be his hand-writing: the first said, he had seen the prisoner write the endorsement upon several bills of exchange, and that he believed the paper to have been written by him; this evidence was objected to as a comparison of hand-writing, but admitted: the second witness said, he had not seen the prisoner write more than once, but that he had seen his endorsement upon bills, and that the paper was very like it: the third witness said, he had seen several notes, which had come to him with the endorsement of the prisoner's name, and that he had paid them, and had never been called to account for mis-payment: the whole of this evidence was received. The prisoner, in his defence, still insisted, that nothing but the comparison of hand-writing had been offered, as proof against him; and the act of parliament, which reversed his attainder, states the admission of this evidence as one of the grounds of the illegality of his conviction. That act recites, among other particulars, that "there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet, supposed to be his hand-writing, which was not proved by any one witness to have been written by him; *but the jury was directed to believe it by comparing it with other writings of his.* (3) However if the printed report of the trial is correct, something more than the mere comparison of hand-writing was laid before the jury; for, according to that report, the first witness had seen the prisoner write his name several times. And though it may be objected to the testimony of the two last witnesses, that the endorsements, mentioned by them were not sufficiently proved to have been written by the prisoner, Sydney's case.

(1) Lord Preston's case, 4 St. Tr. 446, 447. Francia's case, 6 St. Tr. 70. Layer's case, 6 St. Tr. 275. R. v. Dr. Hensey, 1 Burr. 644. De la Motte's case, 21 Howell St. Tr. 810. Eagleton and Coventry v. Kingston, 8 Ves. 438, 474. Stranger v. Searle, 1 Esp. N. P. C. 14. Garrels v. Alexander, 4 Esp. 37.

(2) 3 St. Tr. 302. 8 Howell St. Tr. 467, S. C.

(3) Cited in Layer's case, 6 St. Tr. 279.

(*m*) See Note 913, p. 1321

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that objection will not apply to the other witness, whose evidence was certainly admissible. The same kind of evidence was admitted in Lord Preston's case within a year after the reversal of Sydney's attainder, and has been since received in many cases of great authority. (1)

2. Proof by the party's correspondents.

Another method of acquiring a knowledge of hand-writing is by means of a written correspondence. If a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be admitted to speak to that person's hand-writing. The same questions occur here, as have been before mentioned in the case where a witness speaks from having seen the person write; and in addition to these, one other question arises concerning the identity of the person who wrote the letters; and the admissibility of the evidence must depend upon this, whether there is good reason to believe that the specimens from which the witness has derived his knowledge were written by the supposed writer of the paper in question. (*n*) If this point is clearly proved, the witness who has received the letters will frequently be able to give more satisfactory evidence, than one who has seen the person in the act of writing: for the latter may have seen him write but seldom, or on occasions which were not likely to excite attention; while the other may have had frequent opportunities of re-perusing the letters, and the letters themselves, having been written on subjects of business, will probably have more consistency, and exhibit a fairer specimen of the general character of hand-writing.

The first reported case, in which the admissibility of this kind of evidence appears to have been decided, is the case of Lord Ferrers v. Shirley, which is thus stated in Fitzgibbon's Reports: (2)—"Upon a feigned issue out of Chancery, directed to be tried at bar, whether a deed, pretended to have been exe-

(1) See ante, p. 485, n. 1. And see the case of De La Motte, 21 Howell St. Tr. p. 810.

(2) P. 195.

(*n*) See Note 914, p. 1324.

cuted by the Earl Ferrers in the year 1683, was his deed or not, several witnesses were called to swear to the hand-writing of the subscribing witnesses then dead, and amongst others one J. J., who would have sworn to the name of J. Cottington, whose name was on the deed as a witness, because he had seen several letters written by Cottington: thereupon he was asked, whether he had ever seen Cottington write? to which he answered, that he never had, nor ever saw the person that wrote the said letters, but that his master (to whom the letters were written for the rent of a part of the estate of the late Earl Ferrers, which his said master held,) informed him, they were the letters of Cottington, the Lord Ferrer's steward, who was the person pretended to have attested the deed in question. It was hereupon objected to his testimony, because he could not say with any certainty whether or not the writer of the letters was the same persons that attested the deed; for Cottington, who was supposed to write the letters, might have got some other person to write those very letters for him; and the counsel insisted, that in all cases where a witness would swear to hand-writing, he must be able to say, that he saw such a person write. The Court rejected the witness, because he could not ascertain the identity of the person. But Lord Raymond said, "It was not necessary in all cases that a witness should have seen the person write, to whose hand he swears; for where there has been a fixed correspondence by letters, and it can be made out, that the party writing such letters is the same man that attested a deed, that will entitle a witness to swear to that person's hand, though he never saw him write." Page J. said, "If a subscribing witness to a deed lives in the West Indies, whose hand-writing is to be proved in England, a witness here may swear to his hand, by having seen the letters of such person, written by him to his correspondent in England, because, under the special circumstances of that case, there is no other way, or at least the difficulty will be great, to prove the hand-writing of such subscribing witness." But Lord Raymond differed, and said, "that these special circumstances could not vary the reason of the thing." It was further objected to the same witness, that he should produce the letters, that the Court and the jury might be able to judge of the resemblance between the hand-writing of the letters and that on the deed; but this was

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over-ruled by the Court, "because the witness might well have acquired a knowledge of the character of Cottington's hand-writing, by having seen several letters written by him." The rule to be deduced from this case is, that a witness may be admitted to speak to a person's hand-writing, if he has seen letters, which can be proved to have been written by him; but that this antecedent proof of the identity of the person is indispensably necessary; and further, that hearsay evidence of identity is totally inadmissible. The case, reported to have been put by Page J., is not very clearly stated. If it is understood to mean, that, where a subscribing witness resides abroad, slighter proof of his signature may be given than is necessary in other cases, it certainly cannot be supported; but if the meaning is, that his signature may be proved in the same manner as if he were dead, by a witness who has seen letters proved to be of his writing, the case is warranted by many later authorities, which have been already mentioned. And with regard to the last objection, namely, that the witness ought to produce the letters, that the jury might judge of the resemblance, it appears to have been made as a preliminary objection to the admissibility of his evidence, and was therefore properly over-ruled. But after the witness has been regularly admitted to give his evidence, it seems reasonable that the opposite party should be allowed not only to cross-examine as to the number and appearance of the writings, which the witness professes to have seen, but also to call upon him to produce the writings in court, that the jury may judge of the means which the witness had of forming his opinion.

Another authority, in support of the rule laid down in Lord Ferrars v. Shirley, is Layers's case, (1) on a trial for high treason, where the witness (who had received letters from the prisoner on business five years before, which he answered, and transacted the business according to the directions in the letters, and had been paid for it,) was allowed to speak to the hand-writing of a treasonable paper charged upon the prisoner; and, though the witness in this case had seen the prisoner write some years

(1) 6 St. Tr. 275. See also Gold v. Jones, 1 Black. Rep. 384, S. P. Wade v. Broughton, 3 Ves. & Beam. 172. R. v. Mr. Justice Johnson, 29 Howell, St. Tr. 441. Harrington v. Fry, Ry. & Mo. N. P. C. 90.

before the receipt of the letters, yet, independent of that circumstance, his evidence was judged to be admissible. If he had formed his judgment of the prisoner's hand-writing from these letters alone, "if the case had gone no further," said the Chief Justice, "nobody could have doubted but that, according to the usual course and rules of evidence, the paper ought to be read." With respect to the interval of time that has elapsed since the witness saw the prisoner write, or received letters from him, this is a circumstance not to exclude him from giving evidence, but to be left, with all the other circumstances of the case, to the consideration of the jury. Proof of hand-writing.

This rule of evidence appears not to have been settled at the time of the memorable trial of the seven bishops, who were tried for a libel in the fourth year of James II. In the course of that trial, a witness, called to prove the signature of one of the bishops, said he had received letters from him on business, and that he had done what the letters required, and that he believed the signature in question to be the bishop's hand-writing, but could not swear that those letters were written by him. (1) This was the strongest evidence in the case, excepting the proof of the archbishop's signature, which was proved by one who had seen him write. But Mr. Justice Powell thought it an objection to the evidence before mentioned, that the witness had never seen the bishop write, and that the receipt of the letters was not sufficient, unless he could also swear who had written them. A long and desultory argument ensued on the admissibility of the paper in question, the counsel for the prosecution insisting that the signatures of the bishops had been proved, and the counsel on the other side that the proof was insufficient. Mr. Justice Powell said, (2) "he thought the paper had not been sufficiently proved to be subscribed by the bishops. It is too slender a proof for such a case. I grant you," he added, "in civil actions a slender proof is sufficient to make out a man's hand, as by a letter to a tradesman or a correspondent, or the like; but in criminal causes, such as this, if such a proof is allowed, where is the safety of your life, or any man's life here?" The judges were equally divided in opinion, and the Seven bishops' case.

(1) 4 St. Tr. 338. (2) P. 345.

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paper was not allowed to be read. Thus it appears, that at that time the rule of evidence which has been mentioned was not admitted in criminal cases, though even then it was acknowledged to be reasonable in cases of a civil nature. But this distinction is no longer made. If the rule is true in the one case, it must be equally true in the other; for the rules of evidence, which are the laws of truth, must be uniform and universal.

Comparison of hand-writing.

In the cases which have been mentioned, the proof of hand-writing is founded on a knowledge of the general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writing in question. But no other kind of comparison will be allowed. (*o*) It is an established rule of evidence, that hand-writing cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine. The reason usually assigned is, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance; (1) a reason, however, which appears to be too narrow for a rule of such general application. Another reason for rejecting such a comparison seems to be, that the writings, intended as specimens, to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best serve his purpose, and they are not likely therefore to exhibit a fair specimen of the general character of hand-writing. It has been thought by some an inconsistency in the rules of evidence, to allow a witness to compare in his mind the disputed paper with the impression which a short and transient view of writings may have made upon his memory; yet on the other hand, not to permit the jury to compare it with writings, proved to be authentic, present in court, and open for inspection. The only answer which occurs to this objection is that before suggested, namely, that the writings, which are produced as specimens, having been selected by an interested party to serve a present purpose, are open to suspicion, and liable to the imputation of contrivance.

(1) Macferson v. Thoytes, Peake, N. P. C. 20. Brookbard v. Woodley, ib. n. (*b.*)

(*o*) See Note 915, p. 1326.

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Memorandum to assist witness.

A witness who has seen a person write, and yet retains no distinct impression of the hand-writing, may be allowed to revive his memory by looking at the paper which he saw written, and which he has kept in his possession, and may then declare his opinion as to the genuineness of the paper in question. (1)(*p*) If a witness, after seeing a person write only once, is allowed to give his opinion on the similarity of hand-writing, from the impression which that solitary specimen of writing has left upon his mind, though he may not have seen the specimen since it was first written; *a fortiori* is the witness competent, if he has kept the impression fresh and strong by a frequent inspection of the writing, if he has had an opportunity of restoring the first impression even by a single perusal. A perusal of this writing, even at the moment when the witness is called upon to give his opinion on some other paper, may serve to strengthen the memory, and for that purpose seems to be strictly regular. There would be great danger in allowing papers, which the witness has not seen written, to be put into his hand, under pretence of reviving his recollection: the danger, is, that such a contrivance would not restore the impression formerly produced, but rather serve to create a new and different impression; to permit an inspection of such papers, with a view to assist the witness in judging of some other disputed paper, would in effect be admitting a comparison of hand-writing: but in the case proposed, where the witness looks at the identical paper which he saw written, and from which his mind received the only impression it ever had of the writer's style, there is no danger of contrivance or collusion; and the mind must surely be better able to form an opinion, when the memory has thus been strengthened and refreshed, than when it trusts only to the first fleeting impression, which, from want of retouching, would become gradually fainter and more indistinct.

Comparison in case of ancient writings.

When the antiquity of a writing, purporting to bear a person's signature, makes it impossible for a witness to swear that he has ever seen the party write, it has been held sufficient, that the witness should have become acquainted with his manner of signing his name, by inspecting other ancient writings

(1) Burr v. Harper, Holt, N. P. C. 420. And see Layer's case, 16 Howell's St. Tr. 196, in the examination of the witness Doyley.

(*p*) See Note 916, p. 1331

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which bear the same signature, provided those ancient writings have been treated and regularly preserved as authentic documents. A witness, therefore, may be regularly asked, whether he has inspected such ancient writings, in order to acquire a knowledge of the character of the hand-writing; and then, whether he believes the writing in question to be of the same character. (1)(*q*) It would be regular, also, to lay such ancient writings before a witness at the time of the trial, in the first instance, for the purpose of his inspection; and, after a careful inspection by the witness, to enquire as to his judgment and belief. (2) In a case tried before Mr. Justice Le Blanc, (3) a signature in an entry, purporting to have been made by a person long since deceased, was allowed to be compared with another signature of the same person in a deed of settlement; and this evidence by comparison was admitted, on the ground, that at such a distance of time no better evidence of the fact could be obtained. In another case, a presentment of a jury in a court baron being offered in evidence, the signature of the foreman on the presentment was proved by means of comparing it with the signature on his will. (4) If evidence by comparison is properly admitted in such cases, to prove the genuineness of a signature, the same kind of evidence must also be admissible, to prove that the signature is not genuine.

Evidence as to genuineness of hand-writing.

When the genuineness of a signature is questioned, the most satisfactory (if not, technically speaking, the best) evidence, to disprove the writing and prove it forged, is the testimony of the

(1) Bull. N. P. [236,] citing a case determined by Lord Hardwicke in Chanc. Dec. 1746. 7 East, 282, n. (a.) 14 East, 328. This kind of evidence has been received in many other cases. Several instances occurred in the case of Beer v. Ward, on the trial of an issue out of Chancery, in C. P. sitt. after Mich. T. 1821, before Dallas, C. J., and on a second trial, before Lord Tenterden, in K. B. sitt. after Tr. T. 1823. Holroyd J. also admitted such evidence in the case of Doe dem. Maddock v. Lyne, Leic. Sum. Ass 1822; see also Taylor v. Cooke, 8 Price, 652; and several other cases of a similar description might be cited.

(2) Said by Lord Tenterden in Beer v. Ward, (supra, n. 1,) to have been so ruled by Lawrence J. in a case on the Oxford circuit. See also Ry. & Mo. N. P. C. 143, S. P.

(3) Brune v. Rawlins, 7 East, 282: the supposed writer had been dead about 60 years. The same evidence had been received, on a former trial of the same cause.

(4) Morewood v. Wood, 14 East, 328 In this, and the former instance, it is not precisely stated, in the report, whether the comparison was made by a witness or by the jury; but, upon the whole, it seems the most satisfactory mode of proof, that a witness should inspect the writings, and afterwards give the result of his judgment.

(*q*) See Note 917, p. 1331.

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supposed writer himself provided he is not an incompetent witness. (1) Next to his evidence, is the information of persons who have seen him write, or been in the habit of correspondence with him. Inspectors of franks, clerks of the post-office, and other persons of skill practised in examining hand-writing and in detecting forgeries, have been, in some cases, allowed to give their opinion, from their general knowledge of hand-writing, whether a particular specimen of writing is in a genuine or imitated character. (2) But the admissibility of such evidence was lately considered in the case of Gurney v. Langlands. (3) An issue was in that case directed by the Court of King's Bench, to try whether a signature on a warrant of attorney had been forged. On the trial of the issue, an inspector of franks at the post-office, who was entirely unacquainted with the hand-writing of the supposed writer, was asked, whether, from his general knowledge of hand-writing, he believed the signature to be genuine or imitated. The question was objected to, and the objection allowed by the Judge, Mr. Baron Wood. A motion was in consequence made for a new trial, on the ground of the rejection of this evidence. Some of the Judges of the Court of King's Bench, on that occasion, expressed doubts as to the admissibility of such evidence in general; all of them considered it, if admissible, not entitled to any weight. The reasons, given by Mr. Baron Wood, for rejecting the evidence, are stated in his report of the case to the Court of King's Bench, and appear to be decisive on this question. "When a witness (he says) has seen another person write, or by receiving letters from him has become acquainted with his hand-writing, he has the means of forming an opinion as to its general character. But where, as in this case, the witness acknowledges, that he had not any previous acquaintance whatever with the hand-writing of the person, he could not have any foundation for his opinion or belief, whether the signature in question was genuine, or only an imitation; for he had never seen or known that, on which it was supposed to be an imitation. There is not any universal fixed standard, by which hand-writing can be ascertained to be counterfeit, upon mere

(1) Vide supra, p. 225.

(2) Goodtitle dem. Revett v. Braham, 4 T. R. 497. R. v. Cator, 4 Esp. N. P. C. 117, 145. See also Kemp v. Macknill, Sayer, 132. Stringer v. Searle, 1 Esp. N. P. C. 14.

(3) 5 Barn. & Ald. 330.

inspection, without some previous knowledge of the genuine character." (*r*)

Sect. II.

Of the Proof of Wills.

The statute of frauds enacts, (1) that all devises of lands or tenements, devisable by that statute, or by the statute of wills, (2)* or by force of any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and attested and subscribed (*s*) in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of no effect. (*t*)

Witness to will.

The credibility or competency of the witnesses (for the term "credible" is here to be construed as synonymous with "competent") (*u*) must be considered with reference to the time of attestation; so that, if one of three attesting witnesses would have been incompetent to give evidence at the time of his subscribing, as from want of reason, or from conviction of some infamous offence, (3) the will is not duly executed within the statute of frauds. (*v*) Upon this principle it was determined, soon after the passing of the statute, that a devisee could not

(1) St. 29 C. 2. c. 3. s. 5.
(2) St. 32 H. 8. c. 1. explained by st. 34 H. 8. c. 5.
(3) Pendock v. Mackinder, Willes's Rep. 665.

Copyhold.

* The statutes of the 32d and 34th of Henry VIII. gave the power of devising to such persons only as held by socage, and had an estate of Inheritance in fee simple. But copyholds, not being held by socage-tenure, could not be devised under these statutes, nor were they made devisable by any clause in the statute of frauds; they were considered to be in their nature not properly the subject of a devise, as not passing by a will merely as a will, but by will and surrender taken together. The practice used to be, to surrender to the use of the owner's last will, and on this surrender the will would operate as a declaration of the use, and not as a devise of the land itself. A devise therefore of copyhold lands, or of customary lands which pass by surrender and admittance, would not require any attestation; nor would it require a signature, unless a signature were made necessary by the terms of the surrender to the use of the will. Wagstaff v. Wagstaff, 2 P. Wms. 258. Tuffnell v. Page, 2 Atk. 37. Carey v. Askew, 2 Bro. Ch. Rep. 58. Doe dem Cook v. Danvers, 7 East, 299. 322. But it has been enacted by a late act of parliament, st. 55 G. 3. c. 192, that a disposition of copyhold estates by will shall be effectual, without a previous surrender to the uses of the will.

55 G. 3.

(*r*) See Note 918, p. 1332. (*s*) See Note 919, p. 1339. (*t*) See Note 920, p. 1340. (*u*) See Note 921, p. 1341. (*v*) See Note 922, p. 1342.

attest a will under which he took an interest. (1) (*w*) But an executor, who took nothing under the will, and had no interest in the residue, was always considered a competent attesting witness. (2) (*x*)

Considerable doubts were afterwards entertained whether the competency of such an interested person might not be restored by a release, payment, or extinguishment of all his interest, so as to admit him to prove the execution. (3) (*y*) In consequence of this difference of opinion, the legislature passed an act, which (after reciting, that it had been doubted who were to be deemed legal witnesses within the statute of frauds) enacts, (4) that "if any person shall attest the execution of any will or codicil (to whom any beneficial devise, legacy, estate, interest, gift, or appointment affecting any real or personal estate, except charges on land, &c. for payment of debts shall be given,) such devise, legacy, &c. shall so far only as concerns such person attesting the execution, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, legacy, &c. And in case any will or codicil shall be charged with any debt, and any creditor, whose debt is so charged, shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act: Provided always, that the credit of every such witness, so attesting the execution of any will or codicil in any of the cases within this act, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of, in like manner as the credit of witnesses in all other cases ought to be considered and determined. (*z*) The former part of this statute restores the competency of the attesting witness, by extinguishing all interest which he would

St. 23 G. 2 c. 6.

(1) Hilliard v. Jennings, 1 Lord Raym. 505. Com. Rep. 91, S. C.
(2) Anon. case, 1 Mod. 107. Bettison v. Sir R Bromley, 12 East, 250. Phipps v. Pitcher, 1 Madd. Rep. 144. 6 Taunt. 220, S. C.
(3) See on this subject Anstey v. Dowsing, 2 Stra. 1253. Wyndham v. Chetwynd. 1 Burn, 414. Hindson v. Kersey, 4 Burn. Eccl. Law, 88.
(4) St. 25 G. 2, c. 6, s. 1, 2, 6.

(*w*) See Note 923, p. 1342. (*x*) See Note 924, p. 1343. (*y*) See Note 925, p. 1343. (*z*) See Note 926. p. 1343.

otherwise take under the will. It applies to the case, where the attesting witness is himself the legatee or devisee; and as to him, and any person claiming under him, it makes the devise or legacy absolutely void. It does not extend to the case, where the attesting witness is the husband of a devisee, who takes an estate in remainder under the will: such an attesting witness is not made competent, by the statute, to prove the will. (1)(*a*)

Proof of contents of wills.

The best proof of the contents of a will is the original will itself. An exemplification under the great seal is not evidence in an action of ejectment; (2) nor is the probate of a will in the spiritual court any proof of a devise of real property; for if the original is in existence, the copy is not evidence; and the seal of the Court does not prove it a true copy, unless the suit relate only to the personal estate. (3) But where the contents of a will are given in evidence, not to establish a devise, but merely for the purpose of proving a relationship, as stated in the will, the rolls of the spiritual court, which has authority to enrol have been thought admissible; (4) and if the original will has been lost, the register-book or the ledger-book, in which the will is set out at length, would be good evidence of its contents. (5)(*b*)

Proof of execution by subscribing witness.

The execution of a will is to be proved by the subscribing witnesses, if they are alive and can be produced. On a trial at common law, all the circumstances may be proved by a single witness; that is, upon the supposition, that there are two others, who would be allowed to give the same testimony. (6) If the opposite party disputes the regularity of the execution, he may call any of the other witnesses; but a devisee will not be obliged to call the rest, if one alone can prove all the requisites to establish the validity of the will. This is the rule in courts of common law. (*c*) But on a bill filed in Chancery to establish a will, the rule is, that all the witnesses ought to be examined by the plaintiff. "It is the invariable practice in Chancery," said Lord

(1) Hatfield v. Thorp, 5 Barn. & Ald. 589.
(2) Comberb. 46.
(3) Bull. N. P. 246. 1 Lord Raym. 732.
(4) Buller, N. P. 246.
(5) St. Legar v. Adams, 1 Lord Raym. 731. Skinner, 174.
(6) By Lee C. J. in Anstey v. Dowsing, 2 Stra. 1254. Bull. N. P. 264.

(*a*) See Note 927, p. 1344. (*b*) See Note 928, p. 1345. (*c*) See Note 929, p. 1349.

Camden, in the case of Hindson v. Kersey, (1) "never to establish a will, unless all the witnesses are examined, because the heir has a right to proof of sanity from every one of those whom the statute has placed about his ancestor." (*d*) And on the trial of an issue directed by the Court of Chancery, to examine the validity of a will, all the attesting witnesses ought to be examined; for the issue is part of the proceedings of the Court. When the Court sends an issue to be tried, it reserves to itself the review of all that passes; and there would be an inconsistency in requiring that all the three witnesses should be examined in the Court of Chancery, yet dispensing with their examination on the trial of an issue at law. (2) (*e*) Proof of execution.

The facts to be proved by the subscribing witnesses are, that the devisor signed the will, or that another person signed in his presence and by his express direction, and that the witness and two others attested and subscribed in the presence of the devisor. First, as to the signing by the testator, it is not material in what part of the will he makes his signature. The statute prescribes no particular form, and does not require him to subscribe, but simply to sign. It was therefore determined, in a case soon after the passing of the statute, that if the testator writes his name at the beginning or on the side, the signing is sufficient. (3) But where a will consisted of several distinct sheets, some of which the testator signed, and intended to sign the rest, but was not able, Lord Mansfield thought this was not a signing of the whole will. (4) According to Freeman's report of the case of Lemayne v. Stanley, (5) the Court said, "It is not necessary to write; for some cannot write, and their mark is then a sufficient signing: others have their name on a stamp, and that is good enough." In that case also, three judges held, that, if the testator had put his seal, that would have been of itself a sufficient signing within the statute; but Levinz J. doubted, on the authority of a case in Rolle's Abridgment, where the Court held, that Signing. Sealing.

(4) 4 Burn. Eccl. Law, 93. Ogle v. Cook, 1 Ves. 177; Townsend v. Ives, 1 Wils. 216, S. P.

(2) Bootle v. Blundell, 1 Cooper, Ch. R. 136.

(3) Lemanye v. Stanley, 3 Lev. 1. Hilton v. King, 3 Lev. 86. 9 Ves. 248.

(4) Right dem. Cater v. Price, 1 Doug. 241. 9 Ves. 249. Walker v. Walker, 1 Merivale, 503.

(5) P. 538. See also Hindson v. Kersey, 4 Burn. Eccl. Law, 92, S. P. by Pratt, C. J.

(*d*) See Note 930, p. 1350. (*e*) See Note 931, p. 1351.

Proof of execution.

an award which by the submission ought to have been *signed* by the arbitrator, was not good in law, because it had been only *sealed*. (1) Lord Raymond ruled in a case at *nisi prius*, (2) and Lord Holt is also reported to have said, (3) that sealing was a signing within the statute. But later authorities appear to have considerably shaken this doctrine; (4) and now the established rule seems to be, that sealing without signing is not a sufficient execution of the will. A bare sealing certainly cannot answer the purposes which the legislature had in view: it cannot identify the instrument, nor does it bear, like writing, any peculiar character. "The statute," said Lord Hardwicke, in one of the cases upon this subject, (5) "by requiring the will to be signed, undoubtedly meant some evidence to arise from the hand writing; then how can it be said that putting a seal to it, would be a sufficient signing? for any one may put a seal. No particular evidence arises from sealing; common seals are alike; no certainty or guard arises from thence."

In a late case, where it appeared that the testator was blind, the Court of Common Pleas determined, that it was not necessary to read over the will previous to the execution, in the presence of the attesting witness. (6) "The statute of frauds," said Mr. Justice Heath, on that occasion, "only requires, that the testator shall execute the will in the presence of the attesting witnesses, and, in ordinary cases, when that is done, all is done that is necessary. In the case of a blind man, stronger evidence would be required than the mere attestation of signature: but in this case there was that stronger evidence which the peculiarity of the case seems to call for. Sufficient attention," continued Mr. Justice Heath, "has not been paid, in the course of the argument, to the distinction between what shall be deemed a literal compliance with the provisions of the statute, and what sufficient proof to rebut any imputation of fraud. The question

(1) See ante, p. 472.
(2) Warneford v. Warneford, 2 Stra. 764.
(3) Lee v. Libb, 1 Show. 68.
(4) Smith v. Evans, 1 Wils. 313, by Parker C. B. and the two other Barons present. Grayson v. Atkinson, by Lord Hardwicke, 2 Ves. 459; Ellis v. Smith, 1 Ves. jun. 11, by Parker, C. B, Willes C. J., and Sir J. Strange. See also 17 Ves. 458. 18 Ves. 175.
(5) 2 Ves. 459.
(6) Longchamp v. Fish, 2 New Rep. 415.

of fraud is for the jury entirely, and here they found the will to be a valid will." (*f*) Proof of execution.

The subscribing witnesses are to attest the signing; but the statute does not direct that they shall see the testator sign, or that he should sign in their presence. It requires only an attestation of the signing. Now, at the time of making that act of parliament, and ever since, if a bond or deed had been signed by the party, who afterwards acknowledged it to be his hand-writing before witnesses, that was always considered to be evidence of the signing by the person executing, and a sufficient attestation by the subscribing witnesses: (1) and the rule is precisely the same, where a note or declaration of trust, or any other instrument which requires a bare signing, is acknowledged before witnesses. From analogy to these cases, it has been determined in the case of wills, that the subscribing witness need not see the act of signing, but that it will be sufficient if the testator has acknowledged to them, either to each separately or to all at the same time, that the will is his, or that the signature is his hand-writing. (2) And the subscribing witneses need not express in their attestation, that they subscribed their names in the presence of the testator; but whether they did so subscribe, is a question for the consideration of the jury, to be determined upon the evidence. (3) Attestation. What.

The statute requires the witnesses to attest the signing and to subscribe, but does not direct that they shall be all present at the same time; and although an attestation and subscription by all the witnesses at the same time would be the best security against fraud and imposition, by making each a check upon the other, yet in the interpretation of the statute, courts of law early determined, and it is now an established rule of property, that the witness may subscribe at several times. (4) Separate.

(1) 2 Ves. 457.
(2) Stonehouse v. Evelyn, 3 P. Wms. 253. Grayson v Atkinson, 2 Ves. 454. Ellis v. Smith, 1 Ves. jun. 11. Addy v. Grix, 8 Ves. 504. Westbeech v. Kennedy, 1 Ves. & Beam. 362.
(3) Brice v. Smith, Willes's Rep. 1. 4 Taunt. 217. As to the execution under powers, see ante, p. 468.
(4) Cook v. Parsons, Prec. in Chan. 185. Jones v. Lake, 2 Atk. 177, in note, S. P. Admitted in 2 Ves. 458, and in 1 Ves. jun. 14.

(*f*) See Note 932. p. 1352.

Proof of execution.

Mark.

An attestation by a mark has been adjudged to be a sufficient subscription within the meaning of the statute. (1)

Entire will.

It is not necessary that the testator should declare the instrument, executed by him, to be his will, or that the witnesses should attest every page, or that every page should be particularly shown to them. (2) The whole will, however, ought to be present at the time of attestation; for if a person makes a will on several pieces of paper, and there are three witnesses to the last paper, and none of them ever saw the will, this is not a sufficient execution. (3) But unless there is positive proof that the entire will was not in the room, the question, whether it was so or not, is a question of fact to be left, with all the particular circumstances of the case, to the consideration of the jury.(4)

Presence of testator.

What.

The witnesses are to attest and subscribe in the presence of the testator; and as the object of this provision was to guard against fraud, and prevent the substitution of a false will in the place of the true one, the obvious meaning of the statute must be, that the testator should be in such a state of mind, and in such a situation, as to be capable of seeing the witnesses in the act of subscribing. It will not be a good execution, if the testator was in a state of insensibility, (5) or if it was impossible for him to see the witness subscribe. "It is enough, if the testator might see, it is not necessary that he should actually see them signing; for, at that rate, if a man should turn his head back, or look off, that would vitiate the will." (6) But if the jury find the fact, that the testator might have seen what was passing at the time of the subscribing, then it will be presumed in favour of the attestation, that the testator actually saw what he might have seen. In one case, the testator was sick in bed, and the witnesses withdrew into a gallery, and there subscribed it; between which gallery and the bedchamber where the testator lay, there was a lobby with glass doors, and part of the

(1) Harrison v. Harrison, 8 Ves. 185. Addy v. Grix, ib. 504.
(2) Bond v. Seawell, 3 Burr. 1775. 1 Black. Rep. 407, 422, 454.
(3) Lea v. Libb, 3 Mod. 262. 1. Eq. Cas. Ab. 403, S. P.
(4) Bond v. Seawell, 3 Burr. 1773.
(5) Cater v. Price, 1 Doug 241.
(6) Shires v. Glascock, 2 Salk 687.

glass was broken. (1) In another case, the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that and the door of the testator's room were open. (2) In a third case, the testatrix sat in her carriage opposite the window of her attorney's office, in which office the witnesses subscribed their names. (3) In all these cases (and in others, which might be mentioned to the same effect, differing only in their peculiar circumstances,) the execution was held to be sufficient, the material fact being proved, that the testator might have seen the attestation, if he had chosen to look. Proof of execution.

If one of the subscribing witnesses can prove the execution (as, that the testator signed in the presence of himself and two other witnesses, or that he acknowledged his signing to each of them, and that each of the witnesses subscribed in his presence,) this will be a sufficient proof of the will without calling the others. But if the witness, who is called, can only prove his own share in the transaction, as must happen where the testator acknowledged his signing to the witnesses separately, the other witnesses ought in that case to be called. If they are dead or insane, their hand-writing, and the hand-writing of the testator ought to be proved; it will then be a question for the jury, whether, under the circumstances of the case, it is probable that all the formalities of the statute were regularly observed. (4) Proof by one witness.

The cause of attestation generally expresses, that the witnesses subscribed in the presence of the testator; but such a statement is not absolutely necessary; and though it is entirely omitted, the omission will not conclude the jury from finding, that the will was so subscribed. In the case of Croft v. Pawlett, (5) the attestation was, that the will had been signed, sealed, published, and declared as his last will, in the presence of the subscribing Form of attestation.

(1) Sir G. Sheer's case, cited Carth. 81.

(2) Davy and another v. Smith, 3 Salk. 395.

(3) Cosson v. Dade, 1 Brown, Ch. C. 99. See also Doe dem. Wright and others v. Manifold, 1 Maule & Selw. 294.

(4) Hands v. James, 2 Comyn's Rep. 530. Croft v. Pawlet, 2 Stra. 1109. Brice v. Smith, Willes's Rep. 1. S. P. Lord Rancliffe v. Parkyns, 6 Dow. 202.

(5) 2 Str. 1109.

Proof of execution.

witnesses: the witnesses being dead, and their signatures proved in the common way, it was objected, that this was not an execution according to the statute of frauds; for the signatures of the witnesses could only stand as to the facts to which they had subscribed, and signing in the presence of the testator was not one: but the Court were of opinion, that this was a matter of evidence to be left to the jury, and they gave a verdict in favour of the will. (*g*)

Witness abroad.

If a subscribing witness is abroad, who ought to be called if he could be produced, his hand-writing may be proved in the case of a will, as in cases on the execution of a deed; and the rule appears to be the same in courts of equity. Thus, where a question arose, whether it was necessary to send out a commission to examine one of the witnesses, who was in Jamaica, Lord Alvanley, then Master of the rolls, held, that it was not necessary to have his examination, but that the case was the same as if the witness were dead: (1) the heir at law, he observed, did not make a point of it, but submitted it to the Court; and he cited a case, where it was thought not only unnecessary, but very dangerous to send the will abroad. And in another case, where it was objected, that one of the witnesses was abroad, Lord Chancellor Thurlow said, he doubted whether the rule had ever been laid down so largely, as that the will could not be proved without examining all the witnesses although that had been the practice. (2) (*h*)

Witness denying.

If a subscribing witness should deny the execution of the will, he may be contradicted, as to that fact, by another subscribing witness; and even if they all swear that the will was not duly executed, the devisee would be allowed to go into circumstantial evidence, to prove the due execution. (3) (*i*) If one of the subscribing witnesses, impeach the validity of the will on the ground of fraud, and accuse other witnesses, who are dead, of being accomplices in the fraud, the devisee may give evidence of their general good character. (4) (*j*)

(1) Ld Carrington v. Payne, 5 Ves. 411.

(2) Powel v. Cleaver, 2 Brown, Ch. C. 504. See Grayson v. Atkinson, 2 Ves. 460.

(3) Austin v. Willes, Bull. N. P. 264. Pike v. Badmering, cited 2 Stra. 1096. Lowe v. Joliffe, 1 Black. Rep. 365.

(4) Vide supra, p. 308.

(*g*) See Note 933, p. 1352. (*h*) See Note 934, p. 1354. (*i*) See Note 935, p. 1356. (*j*) See Note 936, p. 1356.

When the subscribing witnesses are dead, and no proof of their hand-writing can be obtained, as must frequently happen in the case of old wills, it will be sufficient to prove the signature of the testator alone. In a case, (1) where the hand-writing of two subscribing witnesses was proved, and no account could be given of the third, the will being above thirty years old, and the testator having been dead for twenty years, an objection was made to the proof of the will; but the Master of the Rolls said, he could not see any distinction in this respect between a will and a deed, except that the former, not having effect till the death, wants a kind of authentication, which the other has; that is, from the nature of the subject; but in this case, he added, I think the proof sufficient: for in a late case in the Court of King's Bench, Cunliff v. Sefton, (2) an enquiry of the same kind was held sufficient. The Master of the Rolls therefore held, that the execution of the will had been sufficiently proved. Proof of execution. Proof of old wills.

In the case of Calthorpe v. Gough and others, at the Rolls, (3) a will thirty years old (reckoned from the date of the will, not from the testator's death,) was not proved by witnesses; and it was said at the bar, that proof was not necessary on account of the age of the will; and, in support of this, a case of Mackery v. Newbolt was cited, in which Sir Lloyd Kenyon, then Master of the Rolls, is said to have decided, that a will above thirty years old should be read without proof, although the testator had died very recently. That point, however, was not decided in the case of Calthorpe v. Gough, because the plaintiff, the heir at law, admitted the will, and claimed under it. In the late case of Lord Rancliffe v. Parkyns, (4) the Lord Chancellor is reported to have expressed an opinion, that a will, thirty years old, if there has been possession under it, proves itself, when the attestation records the fact of the signing of the witnesses in the testator's presence; and, if the signing is not sufficiently recorded, yet that the fact of possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing by the wit- Thirty years old.

(1) M'Kenzie v. Fraser, 9 Ves. 5. n. (†).
(2) 2 East, 183.
(3) 4 Term Rep. 707. n. (*a*), 709.
(4) 6 Dow. 202.

nesses. (1) The general rule seems to be, that a will, thirty years old, unless there has been possession under it, ought to be proved like any other will. (*k*)

(1) 6 Dow. 202.

CHAP. IX.

Of Stamping, as a Requisite of Written Instruments.

General rule.

A WRITTEN instrument, which requires a stamp, cannot be admitted in evidence, unless it be duly stamped; and no parol evidence will be received of its contents. If, therefore, the instrument produced is the only legal proof of the transaction, and that cannot be admitted for want of a proper stamp, the transaction cannot be proved at all; (1) as, in an action for use and occupation, if it appear that the defendant held under a written agreement, which for want of a stamp cannot be received, the plaintiff will not be allowed to go into general evidence; for the agreement is the best evidence of the nature of the occupation. (2) Parol evidence of a lost agreement cannot be received, if the agreement was on unstamped paper; though it has been wrongfully destroyed by one of the parties, yet the other party will not be permitted to approve its contents by parol evidence: this is one of the risks which attend the omission to have the agreement properly stamped, that, if any accident happen to it, before the stamp is affixed, all remedy by action is entirely gone. (3)

Proof of the transaction without writing.

But it may happen in a variety of cases, that the transaction is capable of being proved by other evidence besides the written instrument; and the objection, arising from the stamp-acts, may be avoided by resorting to that other species of proof. Thus, although an unstamped receipt for the payment of a bill is not admissible in evidence, yet the fact of payment may be proved by a witness, who saw the money paid; and even such an un-

(1) R. v. St. Paul's, Bedford, 6. T. R. 452. Hodges v. Drakeford, 1 New Rep. 271. R. v. Castle Morton, 3 Barn. & Ald. 588.

(2) Brewer v. Palmer, 3 Esp. N. P. C. 213. Doe dem. St. John v. Hore, 2 Esp. N. P. C. 724. Ramsbottom v. Mortley, 2 Maule & Selw. 445.

(3) Rippener v. Wright, 2 Barn. & Ald. 478.

(*k*) See Note 937, p. 1356.

stamped receipt may be shown to the witness, as a memorandum to refresh his memory. (1) So, in an action on a promissory note, though the plaintiff cannot give the note in evidence, unless it is duly stamped, yet he will not be precluded from recovering on one of the general counts of the declaration, if he can prove an admission of the general debt, or give other evidence of a consideration received by the defendant. (2) When a party to the suit admits on the record that which, if not admitted, the other party must regularly prove, it cannot be necessary to produce that evidence which would otherwise be required. Thus, where an action is brought upon an agreement, which ought to be stamped, and the form of the pleading is such as to make it unnecessary at the trial to produce the instrument, (as, if it is admitted on the record, and the trial is upon issues collateral to the existence of the agreement,) a court of law will not examine, whether the instrument is legally available with reference to the stamp-acts. (3) So, where a plaintiff filed a bill in Chancery for the specific performance of an agreement, contained in a correspondence between him and the defendant, and the answer of the defendant admitted the letters, insisting only, that they did not amount to an agreement, the Court held that such an admission dispensed with the necessity of producing the letters, and that no objection to the agreement could be taken for the want of a stamp. (4)

Admission on record.

Written agreements and other instruments, made in a foreign country, are not admissible in evidence in any of our courts, unless duly stamped by the laws of that country: if they are not obligatory abroad, they cannot be enforced here. Where a promissory note had been made in Jamaica, but not stamped as it ought to have been by the laws of that island, the Court of King's Bench held, that a party could not recover here upon the note. (5) The party, who takes this objection to the validity of the instrument, will have to show, that a stamp was necessary

Foreign instrument.

(1) Rambert v. Cohen, 4 Esp. N. P. C. 213. Jacob v. Lindsay, 1 East, 460.

(2) Farr v. Price, 1 East, 57. Alves v Hodgson, 7 T. R. 243. Tyte v. Jones, 1 East, 58. n. (*a*). Brown v. Watts, 1 Taunt. 353. Wade v. Beasley, 4 Esp. N. P. C. 7.

(3) By Ld. Eldon Ch., 11 Ves. 596. Hiern v. Mill, 13 Ves. 114. Thynne v. Protheroe, 2 Maule & Selw. 553.

(4) Huddleston v. Briscoe, 11 Ves. 583.

(5) Alves v. Hodgson, 7 T. R. 241. Clegg v. Levy, 3 Campb. 166. Crutchly v. Mann, 5 Taunt. 529.

Denomination of stamp.

by the law of the country ; and for this purpose an authenticated copy of the law ought to be produced. (1) If a person, resident abroad, desire his correspondent in England to fill up a bill of exchange, and return it to him to be signed, and he afterwards signs it abroad, the bill does not require to be stamped, as if it had been drawn in this country ; and the rule is precisely the same, whether he signs his name as drawer, before or after he sends it over to this country to be filled up by his correspondent. (2) In the case of Snaith v. Mingay, (3) which was an action by an indorsee against the indorser, a person resident in Ireland subscribed his name in the character of drawer, and afterwards as first indorser, on a paper, which was properly stamped according to the revenue laws of Ireland, and had every mark to designate it as a bill of exchange; he then sent it over to this country with authority to his correspondent to insert the day of the date, the sum, and the name of the drawee; and it did not appear, that there was any intention of evading the stamp laws, or any imputation of fraud in the transaction: under these circumstances, the Court of King's Bench were of opinion, that the bill was an incipient bill in Ireland, though it was completed here, and that, after it had been completed, it was to be considered as a bill of exchange from the time of its being signed by the drawer ; and consequently that an English stamp was not necessary.

Denomination of stamp.

It is not sufficient, that the stamp used is of the proper value; the stamp must also be of the proper denomination, that is, the peculiar stamp appropriated to the particular species of instrument. (4) A receipt-stamp will not avail, if used upon a promissory note; nor a note-stamp, if used upon a receipt. Articles of agreement under seal require a deed-stamp; an agreement-stamp will not be sufficient, though it may be of greater value. (5) An instrument, containing a present demise of a

(1) Buchanan v. Rucker, 1 Campb. 65. Le Cheminant v. Pearson, 4 Taunt. 367. Millar v. Heinrick, 4 Campb. 155. As to proof of foreign laws, vide supra, p. 401.

(2) Maule & Selw. 94. Boehm v. Campbell, Gow, N. P. C. 56. Mr. Justice Bayley's Summary of Law of Bills, &c. 4th ed. p. 66.

(3) 1 Maule & Selw. 87.

(4) Stat. 37 G. 3. c. 136. s. 1. Stat. 48 G. 3. c. 149. s. 4. Chamberlain v. Porter, 1 New Rep. 30. Wilson v. Vysar, 4 Taunt. 288. Doe dem. Dye v. Whittingham, 4 Taunt. 21.

(5) Robinson v. Drybrough, 6 T. R. 317.

house, containing also an agreement for goods and fixtures in the house, requires a lease-stamp, the one contract being auxiliary to the other; and, unless it is so stamped, cannot be given in evidence as an agreement for the sale of goods, in an action to recover the amount. (1) Denomination of stamp.

The statute 37 G. 3. c. 136, contemplates the mistakes which may arise in the use of stamps, and makes provisions for those mistakes. It enacts, that where any instrument (except bills, notes, and drafts,) shall have been stamped with a stamp of a different denomination, but of equal or greater value than that required by law, the commissioners, upon payment of the duty and a penalty of 5*l.*, may stamp the same with a proper stamp. With respect to bills and notes (which by statute 31 G. 3. c. 25 were forbidden to be stamped after they were made,) the statute of the 37th G. 3. provides, that bills and notes, which should be made subsequent to that act, and stamped with an improper stamp, but of equal or greater value than the stamp required, may be stamped by the commissioners on payment of the duty and a penalty. But bills and notes, made before that act, remain in the same situation as if the act had not passed. The statute 43 G. 3. c. 127. s. 6. provides, that if the stamp is of the proper denomination, it shall not be ineffectual from being of a greater value than the stamp acts require. Before this act, a stamp of greater value, though of the proper denomination, had been determined to be insufficient. (2) And the statute 55 G. 3. c. 184. s. 10. provides, that all instruments, upon which any stamp shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole than the stamp which ought regularly to have been used, shall be deemed valid and effectual in law, except in cases where the stamp used in such instruments shall have been specifically appropriated to any other instrument by having its name on the face. In the case of Taylor v. Hague, (3) indeed, before the statute of the 43 G. 3. the Court held, that a promissory note, upon a stamp of a higher value than was required, would be available, on the particular ground, that the value was composed of three

37 G. 3.

43 G. 3.

55 G. 3.

(1) Corder v. Drakeford, 3 Taunt 382.

(2) Farr v. Price, 1 East, 55.

(3) 2 East, 414.

Several stamps.

different sums applicable to several funds, to which the duties on promissory notes were carried.

Receipt.

An account made out by the one party of goods and cash advanced to the other party, and subscribed by him as having

Acknowledgment.

"*received* the contents," requires a receipt-stamp. (1) But an account of sums advanced to a party, and of disbursements by him, subscribed by him, "*acknowledged* to be correct," is admissible as a mere acknowledgement without stamp. (2) An instrument

Promissory note.

in the following form,—"received of A. B. 100*l*., which I promise to pay on demand, with lawful interest, must be stamped as a promissory note. (3)

Several stamps, when necessary.

A question has often arisen, whether an instrument, to which several persons are parties, requires several stamps, or whether a single stamp is sufficient. And the distinction established is, that if the interest of the parties relates to one thing, which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter as to all the parties, (4) there a single stamp will be sufficient: but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party, against whom, or in whose favour, the instrument is offered in evidence.

Composition deed.

To illustrate the first part of the rule, if a debtor compounds with his creditors, and each creditor signs the same deed, covenanting either to give further day of payment, or to take a certain sum as a composition; there, every covenant is in fact a separate covenant, and the several deed of each creditor, who signs the deed; but the whole being only one transaction, a separate stamp for each person is not required. (5) So, if several persons bind themselves severally in a penalty by one bond, conditioned for the performance of certain acts, by each and every of them, such a bond requires only one stamp. (6) Upon the same principle, it has been held, that an agreement relating

(1) Jacob v. Lindsay, 1 East, 460.
(2) Welland v. Moss, 1 Bing. 134.
(3) Green v. Davies, 4 Barn. & Cress. 235.
(4) 13 East, 246.
(5) 1 New Rep. 278. Goodson v. Forbes, 6 Taunt. 171. 1 Marshall, 525, S. C.
(6) Bowen v. Ashley, 1 New Rep 274.

to the prize shares of different persons, though several as to the share of each, yet being payable in respect only of one entire fund, is only chargeable with one stamp. (1) And on the authority of this case, the Court of King's Bench, determined, in a late case, that a single stamp was sufficient for an agreement, which several persons had entered into for a subscription to one common fund, for the purpose of constructing a dock. (2) In the case of Jones v. Sandys, (3) the question was, whether a bond, in the condition of which a mortgage-deed was mentioned, ought to have had two stamps: and the Court held, that it was not necessary; and in delivering their opinion, they mentioned the cases of bargain and sale, lease and release, mortgage with covenant to pay the money, as constantly charged with only the single duty. Several stamps.

But the rule is different, where the instrument includes in effect several transactions, and the subject-matter is distinct as to the several parties. Thus, an instrument, containing the admissions of several persons to a corporation, requires as many stamps as there are admissions. This was determined in the case of the King v. Reeks, (4) where, in a trial at bar, on an information in the nature of a *quo warranto*, to prove the admission of the defendant, a paper was produced, containing the admissions of the defendant and four other burgesses, which paper was stamped only with one stamp: it was then objected, on the part of the Court, that this paper, having only a single stamp, could not be admitted to be read in evidence; for the statute 9 & 10 W. 3. c. 25. s. 27. enacts, that a certain duty shall be paid for every piece of parchment or paper, upon which any admission into any corporation, &c. shall be written: and the 59th section enacts, that " if any instrument or writing, by that act intended to be stamped, shall, contrary to the intent thereof, be written or engrossed by any person whatsoever (not being a known officer, who in respect of any public office or employment shall be entitled to write the same,) upon parchment or paper not stamped according to that act, then there shall be paid, over and above the duty for such instrument, ten pounds; and that no such instru- Admission of burgesses.

(1) Baker v. Jardine, 12 East, 235. n. (*b*).
(2) Davis v. Williams, 13 East, 232.
(3) Barnes, 463.
(4) 2 Ld. Raym. 1445. 2 Str. 716. S. C.

Several stamps.

ment shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity, until as well the said duty as ten pounds should be paid, &c., and a receipt produced for the same," &c.: under this section of the act it was insisted, that the instrument in question, being an admission of five persons to be burgesses, ought to have five stamps; that it could not be good for any one of the five on account of the uncertainty, or at most it could be good only for one; if it was good for any, it must be for the first named; but the defendant was the third name, and therefore it could not be good for him. And of this opinion, as the report adds, was the whole Court, after argument. The counsel for the defendant then offered in evidence four other distinct pieces of parchment, bearing date on the day mentioned in the information, each of them being duly stamped, which imported the several admissions and swearings of the four burgesses last named in the other parchment, and one of them imported the particular swearing and admission of the defendant. But the witness, who produced these pieces of parchment, proved, that the entries were not made upon them, nor were any of them stamped, till near two months after the day on which they bore date; and, an objection being taken on this ground to the single instrument, which stated that the defendant alone was admitted and sworn, the Court was clearly of opinion, that it could not be admitted in evidence; for by the act the admission is to be on paper or parchment stamped at the time; otherwise it is not to be given in evidence till the penalty is paid, and certificate thereof produced.

In the case of The King v. Reeks, which has been just mentioned, the instrument first offered in evidence purported to contain the admissions of five burgesses, and it does not appear, that the single stamp, which was impressed, applied more to the defendant's name than to any of the others. This circumstance distinguishes that case from two others lately decided, Powell v. Edmunds, (1) and Doe, on the demise of Sir Joseph Copley, v. Day, (2) in which a paper containing contracts by

(1) 12 East, 6.

(2) 13 East, 241. See also Waddington v. Francis, 5 Esp, N. P. C. 182. Perry v. Bouchier, 4 Campb. 80.

several persons relative to different things, though stamped with a single stamp, was adjudged to be good evidence as to one of the contracting parties, because the stamp appeared to be applicable exclusively to his name. In the first case, the paper contained an agreement, signed by the defendant, for a lot of timber, and underneath a second agreement, with another person for a different lot; this last had pencil marks drawn across it, as if for the purpose of striking it out; the stamp was affixed on that part of the paper on which the defendant's agreement was written, and below was the stamp-officer's receipt for a penalty "for making the above agreement." An objection was taken on the ground of there being a single stamp, which was over-ruled at the trial, and afterwards by the Court of King's Bench. In the other case, (1) the paper contained a variety of independent lettings of land betwen the landlord and a number of his tenants, one of whom was the defendant; the stamp was affixed opposite the defendant's name, and it appeared from the receipt of the stamp-officer, that the money of affixing it was paid after the commencement of the action and only a short time before the trial; the instrument also appeared, when produced in evidence, to be cancelled with black-lead pencil marks as to every name except that of the defendant, and it was not proved, that the instrument was not so cancelled at the time when the stamp was affixed. Under these circumstances the Court held, that the single stamp was intended to be applied to the contract with the defendant, and consequently that the paper was admissible. "If, indeed," said Lord Ellenborough C. J., "the instrument had been required to substantiate the several contracts with the different tenants, no doubt there should have been a stamp affixed to each, although the same terms of agreement applied to all: one stamp has been only held to be sufficient upon an instrument affecting the separate interests of several, where there has been a community of the same subject-matter as to all the parties. But here it sufficiently appears from the circumstances of the case, that the stamp was meant to be applied to the defendant's signature."

Alteration of instrument.

When a stamped instrument has issued as a valid security, and

Alteration of bill of exchange or note.

(1) 13 East, 241. See also Waddington v. Francis, 5 Esp. N. P. C. 182.

Alteration of instrument.

been once used for one purpose, it cannot be altered without a new stamp. If the parties afterwards vary their original intention, and make a new instrument different from that which they originally contemplated, a new stamp will be necessary. (1) If a bill of exchange, for example, has been once effected, and has issued in a perfect form from the drawer to the acceptor, by whom it was returned with his acceptance to the drawer, it cannot be altered without being re-stamped. Thus, in the case of Bowman v. Nichol (2), where a bill of exchange had been drawn on a proper stamp, payable 21 days after date, and, while it continued in the hands of the drawer, was altered with the consent of the acceptor, to be made payable 51 days after date, and was again altered to 21 days after date, subsequently to the time of becoming payable according to its original form; the Court of King's Bench held, that at the time when the last alteration was made, the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; and that there ought to have been a new stamp. So, where a promissory note, payable by the defendant to the plaintiff or order (3), was originally expressed to be for value received, but, on the day after it had been signed and delivered by the defendant to the plaintiff, was with the consent of the parties altered by the addition of the words "for the good-will of a lease and trade," the Court held, that the alteration was a material one, because it was evidence of a fact, which, if necessary to be enquired into, must otherwise have been proved by different evidence, and also because it pointed out the particular consideration for the note, and put the holder upon enquiring, whether that consideration had passed; a new stamp was therefore necessary, for the want of which the note could not be received in evidence.

A person having drawn a bill payable to his own order, indorsed it to A., who indorsed it to B., and, the bill being dishonoured, paid the amount to B.; on which B. struck out his

(1) 15 East, 418.

(2) 5 T. R. 537. See also Master v. Miller, 4 T. R. 320. 2 H. Black. 141. S. C. Cardwell v. Martin, 1 Campb. 79.; 9 East, 190, S. C. Bathe v. Taylor, 15 East 412. Walton v. Hastings, 4 Campb. 223. 1 Starkie, N. P. C. 215. S. C. Outwaite v. Luntley, 4 Campb. 179. Matson v. Booth, 5 Maule & Selw. 226. See Bayley on Bill, 4th edit. 91.

(3) Knill v. Williams, 10 East, 431.

own indorsement and A.'s indorsement, and returned the bill to the drawer; the drawer then indorsed it, with the indorsements struck out, to the plaintiff, without a new stamp; the Court of King's Bench held, that the plaintiff was entitled to recover against the acceptor; the bill not having discharged its functions, when given to the plaintiff. (1) Alteration of instrument.

An alteration of the date, (2) or of the time for which a bill has to run, (3) made with the consent of the drawer and the acceptor, before the bill is negotiated, will not render a new stamp necessary; but it will be incumbent on the party, who sues upon the bill, to prove the time of making the alteration. An alteration of the date in an accommodation bill, made previously to its being issued to the first *bona fide* holder for a valuable consideration, will not require a fresh stamp; for, until it is so issued, it is not a valid security for money; in other words, it does not issue as a legal security until it passes the hands of a person who can make a valid claim upon it. (4)

It is provided by the 13th section of the stat. 35 G. 3. c. 63., relating to stamp-duties on sea-insurances, "that nothing in that act shall be construed to extend to prohibit the making of any alteration, which may lawfully be made in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten, or to require any additional stamp-duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, (5) and the premium or consideration originally paid or contracted for exceed the rate of 10 shillings per cent. on the sum insured, and so that the thing insured shall remain the property of the same persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act, and so that no additional or further sum shall be insured by means of such alteration." Alteration of policy of insurance.

(1) Callow v. Lawrence, 3 Maule & Selw. 95.
(2) Johnson v. D. of Marlborough, 2 Starkie, N. P. C. 313.
(3) Kennerley v. Nash, 1 Starkie, N. P. C. 452.
(4) Downs v. Richardson, 5 Barn. & Ald. 674.
(5) Ramstrom v. Bell, 5 Maule & Selw. 270.

Alteration of instrument.

1. Alteration as to *time of sailing.*

In the case of Kensington v. Inglis, (1) where the policy was "on goods and specie on board of ship or ships sailing between the 1st of October, 1799, and the 1st of June, 1800, being the property which should first sail to a certain amount, and upon the vessels carrying the goods," and a memorandum was written on the policy and subscribed by the defendant on the 11th of June, 1800, before any notice of the determination of the risk had been received, by which memorandum it was agreed to extend the time of sailing to the 1st of August following, the Court of King's Bench in this case held, that the memorandum did not require a stamp; for although the time of sailing was extended, yet no new subject of insurance was introduced by the memorandum, but the object insured continued the same.

2. Alteration as to *property insured.*

In another case, (2) which occurred upon the same clause, where the policy was originally "on ship and *outfit*," from London to the South Seas, but, after the sailing of the ship, was altered by consent of the underwriters, and declared to be "on the ship and *goods*," instead of ship and *outfit*, the Court determined, that, as the *outfit*, originally insured, was essentially different from *goods*, which were afterwards made the subject of insurance, the policy in its altered state required an additional stamp. "The question is," said Lord Ellenborough C. J., in delivering the judgment of the Court, "whether that part of the provision, which requires, that 'the thing insured shall remain the property of the same person,' has been in this case complied with. The words, 'the thing insured shall remain the property,' appear properly to require and apply to *one* identical and continued subject-matter of insurance; such subject-matter *all along remaining* the property of the same proprietor, and to be ill suited to a case like the present, where the thing last insured is not only in fact, but in name and kind, as a specific subject of insurance, essentially different from the thing first insured, and which begins also to have an existence at a different and much later period than the other, and when the thing first insured

(1) 8 East, 273. Hubbard v. Jackson, 4 Taunt. 169. Ridsdale v. Shedden, 4 Campb. 107.

(2) Hill v. Patten, 8 East, 373. 1 Campb. 72. S. C. French v. Patten, 9 East, 351. Hubbard v. Jackson, 4 Taunt. 169. The cases on this subject are collected in Parke's Treatise on Insurances, p. 46., last edit.

scarcely or in a small degree only, *remains* or continues to exist at all."

Alteration of instrument.

3. Alteration as to *warranty of sea-worthiness.*

A memorandum indorsed upon a policy waiving the warranty of sea-worthiness, does not require a new stamp. (1) And Mr. Justice Bayley compared the case to that of a warranty to sail within a certain time, which may be altered by an unstamped memorandum, even after the period when the condition has terminated, without affecting the continuance of the policy.

4. Material alteration.

Where a policy has been executed in the common printed form, without any specific subject of insurance expressed in writing, and the subject-matter is afterwards inserted, the assured cannot recover against those underwriters who have not signed the policy after the addition; for a material alteration is introduced with respect to such of the underwriters as have not assented. (2) It has been determined by several cases, that a material alteration in a material part of a policy of insurance, made by one of the parties interested, without the consent of all parties, destroys the policy as to those underwriters who have not assented to the alteration. (3) Even if all the parties assent to an alteration, and the alteration is such as to make the policy void for want of a new stamp, the policy cannot be enforced in its original form. (4) This is a general principle, and applies equally to bills of exchange, promissory notes, and other negotiable instruments. An immaterial alteration in a policy of insurance, made by the party insured, (as, an alteration by the insertion of words, which add nothing to what was expressed before in substance, and do not in any degree vary the legal effect of the policy (5) will not vacate the policy, even as against a party who refused his consent to the alteration.

Alterations to correct mistakes.

Where an alteration is made in an instrument, with the consent of all parties, in order to correct a mistake, and to make

(1) Weir v. Aberdeen, 2 Barn. & Ald. 325.
(2) Langhorn v. Cologon, 4 Taunt. 330.
(3) Fairlie v. Christie, 7 Taunt. 416. Holt, N. P. C 331. S. C. [Campbell v. Christie, 2 Starkie, N. P. C. 64.
(4) French v. Patten, 9 East, 351.
(5) Sanderson v. Symonds, 1 Brod. & Bing. 426.

the instrument consistent with the original intention of the parties, there it has been held, that a fresh stamp is not necessary.

Bill of exchange.

Thus in the case of Kershaw v. Cox, (1) where a bill had been drawn payable to the defendant, but not payable to order, the defendant on the day after the bill was drawn, indorsed it over to the plaintiff, without adverting to the omission of the words "or order;" on the same day the plaintiff returned it to the defendant, to get the omission rectified, and the drawer then inserted the words; here, there was strong evidence to show, that the omission was by mistake, for the bill was intended to be negotiable, and as such immediately indorsed, as if it had been drawn payable to order, and as soon as the omission was discovered, it was rectified by the proper parties: the learned Judge, therefore, who tried the cause, left it to the jury to consider, whether the words, afterwards added, had been originally intended to have been inserted, but were omitted by mistake; and the jury finding this to be the case, it was ruled, that a fresh stamp was not required. The point was afterwards brought before the Court of King's Bench, on a motion to enter a nonsuit, and the alteration was adjudged to be allowable under the stamp acts; having been made merely for the purpose of rectifying a mistake in drawing the bill contrary to the intention of the parties.

Bill.

In another case, which occurs upon this subject, where an action was brought against the defendant as acceptor of a bill of exchange, (2) it appeared, that the defendant and another person being indebted to the plaintiff, agreed to give him a bill of exchange, to be drawn by the one and accepted by the other (the defendant:) instead of this, they sent him a promissory note, made by the one and indorsed by the other, which the plaintiff immediately returned, that it might be altered into a bill of exchange according to the agreement, and the alteration was accordingly made; an objection was taken, on the ground that the instrument required a fresh stamp; but Lord Ellenborough, C. J., ruled, that the stamp impressed was sufficient to render

(1) 3 Esp. N. P. C. 246. before Le Blanc J., cited 10 East, 435., and 15 East, 417. Jacobs v. Hart, 2 Starkie, N. P. C. 45. Robinson v. Touray, 1 Maule & Selw. 217. Robinson v. Tobin, 1 Starkie, N. P. C. 336.

(2) Webber v. Maddocks, 3 Campb.

the instrument available, since it had not been negotiated as a promissory note, and the alteration might be treated as the correction of a mistake, according to the terms of the original agreement.

Bill of sale of ship.

The case of Cole v. Parkin (1) affords another instance of the rectification of a mistake, in a bill of sale of a ship. The bill of sale, in reciting the certificate of registry, stated Guernsey as the port where the certificate was granted, instead of Weymouth, and in this state was executed; but the mistake, being afterwards discovered, was rectified with the consent of all parties, and the deed delivered afresh: the question was, whether this second delivery made a new stamp necessary. Lord Ellenborough C. J., in delivering the judgment of the Court, referred to statute 26 G. 3. c. 60. s. 17., which enacts, that a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry in words at length, shall be utterly null and void to all intents and purposes. "This bill of sale, therefore, when first executed, was, from the mistake in the recital of the certificate of registry, to all intents and purposes null and void; it took no effect whatever from its delivery; and the stamp impressed upon it was wholly inoperative. This defect arose not from intention, but from mistake. The instrument, as first executed, was not what the parties meant to execute; and it was not in the state in which it was at first intended to be, till it was altered. This is not the case of substituting a new and second contract, in the place of a preceding effectual one, upon a change of intention in the parties; but merely making the contract what it was originally intended to have been; and in such a case, where the instrument upon its first execution was void to all intents and purposes, where its insufficiency arose from a mere mistake, where in consequence of that mistake it was not in the state in which it was intended to have been, when it was so executed, and where upon its second execution it is only put into that state which was originally intended, we think it is not going beyond the fair spirit of the stamp-laws to hold, that upon such second execution, being the first which was effectually operative, a new stamp was not requisite." So, the mistake of an agent, in Policy.

(1) 12 East, 471.

Unstamped writing, for collateral purposes.

declaring the interest in the margin of a policy to be on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp. (1)

Unstamped instrument, for collateral purposes.

Written instruments have been admitted in evidence without a stamp in certain cases, when produced merely to prove something collateral, and not for the purpose of being enforced between the parties, and when it was not material to consider whether the instruments were good or available in law. In the case of Holland q. t. v. Duffin, (2) which was an action to recover several sums of money, forfeited by insuring tickets in the lottery, contrary to the statute 22 G. 3. c. 47. s. 13., Lord Kenyon held, that an instrument, purporting to be a policy of insurance, might be given in evidence, though not stamped as a policy; for such a contract is declared by the act to be illegal and void, and could not have been intended by the legislature as an object of taxation. And in an action of debt for bribery at an election under statute 2 G. 2. c. 24. s. 7. (3) Lord Ellenborough C. J. held that an unstamped promissory note payable to the defendant, which a witness said he had given for the re-payment of money, received by him as a voter from the defendant (one of the candidates,) might be admitted as evidence of the transaction, to corroborate the testimony of the witness.

Unstamped receipt.

An unstamped receipt may be shown to a witness as a memorandum, in order to refresh his recollection of a fact there stated; (4) or for the purpose of confirming his evidence, in case the receipt itself, if stamped, would be admissible as confirmation. (5) An unstamped contract, made between commissioners of the navy and other persons, containing also a direction by the commissioners to their clerks, in consequence of the contract, to issue certificates in a certain form, is evidence of such a direction having been given, though not evidence of the con-

(1) Robinson v. Touray, 1 Maule & Selw. 217. Sawtell v. Loudon, 5 Taunt. 359.

(2) Peake, N. P. C. 57.

(3) Dover v. Maestaer, 5 Esp. N. P. C. 92. And see the point in Pooley's case, on the second trial, infra, p. 521.

(4) Rambert v. Cohen, 4 Esp. N. P. C. 213. Jacob v. Lindsay, 1 East, 460.

(5) See Dover v. Maestaer, 5 Esp. N. P. C 92.

tract. (1) A written agreement, for which an action of trover is brought, and which is produced at the trial by the defendant, is not inadmissible in evidence, on account of the want of a stamp. (2) Unstamped writing, for collateral purposes.

An unstamped part of an agreement is admissible on the part of the plaintiff, as secondary evidence of the agreement, after proof of notice to the defendant to produce the stamped part which is in his possession (3): and there can be no difference in this respect, whether the plaintiff has specially declared upon the agreement, or merely offers it as evidence in the course of the cause. Unstamped agreement.

On a question of settlement by hiring and service, although a general hiring cannot be presumed from the mere fact of service, if the service has been performed under written articles of agreement, which are not admissible in evidence for the want of a proper stamp, yet, where the question is, whether the service commenced after the expiration of the articles, they may be properly inspected for the purpose of ascertaining this collateral fact, whether they would apply to the subsequent service. (4)

In an action for the non-delivery of goods, if the contract is proved by parol evidence, and it should appear that the parties made a contract on unstamped paper, the Court may inspect the instrument, to see whether it applies to the goods, which are the subject of the action; and if they are not included in the contract, the parol evidence would be properly admitted. (5) So, in an action for money lent, where the plaintiff proved, that he had advanced the money to the defendant, who gave him a note for the amount on unstamped paper, and the defence was, that he had been induced to give the note in a state of intoxication, without having received any part of the money, Lord Ellenborough C. J. held, that the note might be inspected by the Unstamped paper.

(1) Hedges's case, 28 Howell St. Tr. 1344.
(2) Scott v. Jones, 4 Taunt. 365.
(3) Garnons v. Swift, 1 Taunt. 507. Waller v. Horsfall, 1 Campb. 501. Munn v. Godbold, 3 Bing. 294.
(4) R. v. Pendleton, 15 East, 449, 455.
(5) 15 East, 455.

Unstamped writing, for collateral purposes.

jury, as a contemporary writing, to prove or disprove the fraud imputed to the plaintiff (1).

In prosecutions for forgery.

A paper, purporting to be a bill of exchange or promissory note, may be given in evidence, though unstamped, to support an indictment for forgery, or for uttering with a knowledge of the forgery; (2) for the stamp acts being revenue laws, and not intended to affect the crime of forgery, cannot alter the law respecting it; the stamp is not, properly speaking, any part of the instrument, but merely a mark impressed on the paper, to denote the payment of a duty, and is collateral to the instrument itself. (3) And if a person were to be sued for a penalty, for having negotiated an instrument without a stamp, there is no doubt but that the unstamped instrument might be given in evidence, notwithstanding the general prohibitory words of the stamp acts. (4)

1. Pooley's case.

But where the instrument is offered in evidence, as a valid available legal instrument, and is not such from the want of a stamp, it cannot be admitted, whether in a criminal or civil suit. In the case of King v. Pooley (5) the prisoner was indicted under the statute 7 G. 3. c. 50. s. 1., which makes it a capital felony for any person, employed in receiving letters, to secrete any letter containing a bank note, or *any warrant, or draft, &c. for the payment of money.* It appeared at the trial, that the draft, contained in the letter, which the prisoner had secreted, was drawn above ten miles from the banking-house; the prisoner's counsel then objected, that, as the draft was on unstamped paper, it was not a *valid draft for the payment of money*, and therefore not within the statute on which the prisoner was indicted; and they founded this objection on the statute 31 G. 3. c. 25., the fourth section of which exempts

1st trial.

(1) Gregory v. Fraser, 3 Campb. 454.

(2) Hawkeswood's case, 1783, 1 Leach, Cr. C. 292., 2 East, P. C. 955. S. C. Lee's case, 1784, 1 Leach, Cr. C. 293. n. (*a*). Morton's case, 1795, 2 East, P. C. 955. Reculist's case, 1796, 2 Leach, Cr. C. 811. Davies's case, 1796, 2 East, P. C. 956. 3 Barn. & Ald. 589. See Whitwell v. Dimsdale, Peake, N. P. C. 168.

(3) See the judgment of Mr. Judge Grose, who delivered the opinion of the Judges in Reculist's case, 2 Leach, Cr. C. 813.

(4) Ibid.

(5) 3 Bos. & Pull. 311. Russ & Ry. Cr. C. R. 12. S. C.

from stamps only such orders for the payment of money as are drawn on a banker residing within ten miles of the place where the order is made; and the nineteenth section provides that no bill, note, draft, &c. shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless they are written on paper duly stamped. The evidence was admitted; the prisoner convicted: and the point reserved. The case was afterwards argued before the Judges in the Exchequer chamber; when the objection, taken on the part of the prisoner, was, first, that which has been stated, namely, that the draft in question was not a draft for the payment of money, within the meaning of the stat. 7 G. 3. c. 50. s. 1.; and, secondly, that the indictment, which averred, that *the draft was in force at the time of the secreting*, had not been proved, as from the want of a stamp the draft had never been available. All the judges held that the conviction was wrong; on the ground that the draft, not being stamped, was of no value and not available, and therefore not a draft within the act.

Unstamped writing, for collateral purposes.

The prisoner was afterwards tried on the second section of the same act, which makes it a capital offence for any person to rob any mail of a letter or packet, or *to steal or take any letter from any mail*, or from any place for the receipt of letters, &c. (1) It was objected at the second trial, that the draft, before mentioned, being on unstamped paper, could not be received in evidence as a medium to show that the prisoner had stolen the letter; but the Court overruled the objection, being of opinion, that the draft, though unstamped, might be admitted in evidence for collateral purposes, though not for the purpose of recovering the money mentioned in it, and the evidence was accordingly received. Here the paper was not offered in evidence, as it was on the former trial, as a draft for the payment of money, but merely as a paper contained in the letter, and the fact of the prisoner having this paper in his possession was evidence against him of his having stolen the letter in which it was contained.

2d trial.

An objection, similar to that which was taken on the former

2. Gillson's case.

(1) 3 Bos. & Pull. 315. And this part of the case is reported in 1 East, Pl. C., addenda, xvii.

Unstamped writing, for collateral purposes.

trial in the last case, was again taken in the case of The King v. Gillson. (1) The indictment was for feloniously setting fire to a certain house *with intent to defraud an insurance company:* at the trial, a policy of insurance was given in evidence on the part of the prosecution, by which the prisoner's goods, in a house there described, were insured against fire, and upon this policy a memorandum was indorsed, stating, that the goods insured had been removed from the house described in the policy, to another house mentioned in the memorandum, in which last-mentioned house the prisoner was charged with having committed the felony. The policy was properly stamped, but the memorandum had no stamp ; and the objection taken for the prisoner was, that, in support of the charge, it was essentially necessary to show, there subsisted a *legally effective contract*, and that, by the express provision of the stamp-acts, the memorandum in question, not being stamped, could not be given in evidence, or be good or available in any manner whatever; and a distinction was drawn between this case and that above mentioned, where an unstamped forged instrument was admitted in evidence against the party charged with having forged it, or with uttering it knowing it to be forged. The point was reserved, and argued in the Exchequer Chamber: and judgment was afterwards given at the Old Bailey, that the prisoner should be discharged.

3. Hall's case.

On a prosecution for embezzling notes, which the prisoner had received as clerk for his employer, a written paper given by the prisoner as a receipt of the notes in question, and purporting to be such, is not admissible as a receipt, unless duly stamped. (2)

Stamp presumed, when.

A regular stamp may be presumed in certain cases. If an agreement is in the possession of a party to the suit, who refuses to produce it after a notice, the other party may give in evidence a copy of the agreement, without proving that the original was duly stamped; the party who has the original in his possession may prove the negative. (3) If an instrument,

In possession of adverse party.

(1) 1 Taunt. 25. Russ. & Ry. Cr. C. R. 138. S. C. Five Judges were for the reception of the evidence: six Judges contra.

(2) R. v. Hall, Ry. & Mo. Cr. C. R. 67.

(3) Crisp v. Anderson, 1 Starkie, N. P. C. 35.

which ought to be stamped, is proved to have been lost, parol evidence of its contents may be admitted without proof of the stamp being regular, where it can be presumed, from the circumstances of the case, that the instrument was duly stamped. (1) In the latest case upon this point, on a question of settlement between two parishes (2) it appeared, that an indenture of apprenticeship, which had been regularly executed thirty years before, was delivered to the apprentice at the end of the term, and lost; that a premium had been paid with the apprentice; and further, that the parish, in which he had served under the indenture, had for many years treated him as one of their parishioners; on the other side, it was proved by the deputy-register and comptroller of the apprentice duties, that it did not appear that such an indenture had been stamped with the premium stamp, or enrolled, from the time of the date to the time of the trial of the appeal; but the Court of King's Bench were of opinion, that the Court below were right in presuming, that the indenture had been properly stamped. "The question before the Justices," said Lord Ellenborough, "was, whether the presumption, that all was rightly done after the lapse of so many years, was sufficiently rebutted by the negative evidence of the officer; they thought not, and we cannot say that they have done wrong; for the presumption of law is to be favored, and against the negative evidence they may have set the possibility of an irregularity in the returns made to the office." Lost instrument.

If an action cannot be brought upon an agreement, until it is stamped, it must be stamped before the commencement of the action: but if it is an agreement which may be stamped on the payment of a penalty, then it may be stamped during the action. (3) In some cases the legislature has declared, that the paper cannot be stamped after it has been written, as in stat. 35 G. 3. c. 63. s. 14. concerning sea-insurances (4,) and in stat. 31 G. 3. c. 25. s. 19. concerning bills of exchange, pro- Defect of stamp, how cured.

(1) R. v. East Knoyle, Burr. set. Case, 151. 1 Bott. 547. S. C. R. v. Badby, 1 Bott. 549. S. P.
(2) R. v. Long Buckby, 7 East, 45.
(3) 9 Ves. 252. 11 Ves. 595. R.
v. Bishop of Chester, 8 Mod. 365. 1 Stra. 624, S. C.
(4) Rodereck v. Hovil, 3 Campb. 103.

Agreement.

missory notes, &c.* In other cases it is declared, that a penalty shall be incurred by writing on unstamped paper; and that the instrument shall not be available in evidence, until the duty and penalty are first paid, and a receipt for them produced, and until the instrument is marked with a proper stamp. (1) Here the defect may be cured by having a proper stamp affixed, which may be done by paying the duty, together with the penalty for not having the instrument stamped within the time limited. (2) In other cases the legislature only imposes a penalty for not having the instrument duly stamped; and in these, though the party would be liable to a penalty, yet the paper may be given in evidence, though unstamped. (3) If the defendant has paid money into court, in an action on a bill of exchange, (4) or has by his plea admitted letters of administration (of which the plaintiff, as administrator, made profort) (5), he cannot object to the stamp as insufficient. The payment of money in the one case, and the plea in the other, admits the validity of the instrument.

Agreements, when to be stamped.

The stat. 48 G. 3. c. 149. (6), one of the principal acts relating to stamp duties, enacts, that every agreement, minute, or memorandum of agreement, (not particularly exempted,) that is made in England under hand only, or made in Scotland without any clause of registration, is liable to a stamp in proportion to the number of words contained, when the subject-matter is of the value of 20*l.* or upwards, whether the same shall be only evi-

(1) St. 5 & 6 W. & M. c. 21. s. 11. 12 Ann. st. 2. c. 9. s. 25. St. 37. G. 3. c. 136. s. 2. Hunt v. Stevens, 3 Taunt. 113.

(2) R. v. Bishop of Chester, 1 Stra. 624.

(3) R. v. Pearce, Peake. N. P. C. 75.

(4) Israel v. Benjamin, 3 Campb. 40.

(5) Thynne v. Protheroe, 2 Maule & Selw. 553.

(6) See also St. 23 G. 3. c. 58. s. 3. St. 35 G. 3. c. 30. s. 1. 6. St. 37 G. 3. c. 90. s. 1. 6. 55 G. 3. c. 184. Sch. Part I.

*Although the stamp-act of the 48 G. 3. c. 149. does not in express terms require, that the paper shall be stamped before the bill or note is written, yet as the 3d and 8th sections of this statute confirm and adopt all provisions and regulations relating to former duties, the clause in the 19th section of the 31 G. 3. is still in force. The 34 G. 3. c. 32., which authorizes the commissioners to stamp bills, &c. after they were drawn, on payment of a penalty, was only a temporary act, and has expired. See Bayley on Bills, p. 24.

dence of a contract, or obligatory upon the parties from its being a written instrument. Agreement.

In an action against a wharfinger or carrier for not delivering goods, a receipt for the goods is admissible in evidence without stamp, although the value of the goods may exceed 20*l.*, the wharfage or price of carriage being under that sum; for this, and not the value of the goods is the matter of the agreement. (1)

A written paper, delivered by an auctioneer to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, is not such a minute of the agreement as requires a stamp, unless it is signed by some of the parties, or by the auctioneer: nor is it such a writing as will exclude parol evidence (2); but if signed by the auctioneer, and delivered to the bidder, it ought to be stamped. (3) A contract of marriage may be proved by unstamped letters; the statute evidently applying to such matters only as are the subject of pecuniary calculation. (4)

An agreement is to be stamped in proportion to the number of words which it contains, not according to the number of items agreed upon. But if the parties add another item to an agreement which is already complete, and which has been executed between them, an additional stamp ought to be annexed, to make such new item available. As, if two persons lay a wager, and write it down in the form of an agreement, which is stamped, and afterwards by another agreement, indorsed on the first, they consent that the bet shall be doubled; here there ought to be two agreement-stamps, or the party cannot recover on the last bet. (5) A written acknowledg-

(1) Chadwick v. Sills, by Holroyd J.; and rule afterwards refused by K. B. Ry. & Mo. N. P. C. 15. Latham v. Rutley, by Lord Tenterden, Ry. & Mo. N. P. C. 13.

(2) Ramsbottom v. Tonbridge, 2 Maule & Selw. 434. Ingram v. Lea, 2 Campb. 521. Adams v. Fairbain, 2 Starkie, N. P. C. 277. Drant v. Brown, 3 Barn. & Cress. 665. Hawkins v. Warre, 3 Barn. & Cress. 690.

(3) Ramsbottom v. Mortley, 2 Maule & Selw. 445.

(4) Orford v. Cole, 2 Starkie, N. P. C. 351.

(5) Robson v. Hall, Peake, N. P. C. 127. Lord Kenyon is said to have been of opinion, that the plaintiff might recover on the *original* bet. But the plaintiff was nonsuited on another point.

Agreement.

ment of the payment of money stamped as a receipt, is evidence of the fact of payment, although there may be other writing on the same paper amounting to an agreement, provided this does not in any manner control or qualify the former part (1;) it is evidence also of the consideration on which the money was paid, if the consideration is stated in the receipt. (2)

Cognovit.

A cognovit, being a mere acknowledgment of an account without any mutuality, does not require a stamp. But if there be any thing of agreement beyond the mere authority to enter a cognovit, then a stamp becomes necessary. Thus, where the defendant gave a cognovit to the plaintiff on unstamped paper, by which he agreed to confess, that the plaintiff had sustained damage in the action to the amount of 30*l.*, on which no judgment was to be entered, unless the defendant made default in payment of the sum of 5*l.* by instalments, together with costs to be taxed, the Court held, that, in consequence of the terms which had been added, the paper in question amounted to an agreement; but that it was an agreement for less than 20*l.*, and therefore not liable to a stamp. (3)

Exemptions.

The following particulars are exempted from stamp-duties imposed on agreements. (4)

Memorandum of insurance.

1. Any label or memorandum containing the heads of insurances, to be made by the Royal Exchange Assurance and London Assurance.

Agreement for a lease.

2. Memorandum or agreement for granting a lease or tack, at rack-rent, of any land or tenement, under the yearly rent of 5*l.*

Whether a particular agreement is to be considered as a lease, (in which case it will require a lease-stamp) or merely as an

(1) Grey v. Smith, 1 Campb. 387.
(2) Watkins v. Hewlett, 1 Brod. & Bing. 1.
(3) Ames v. Hill, 2 Bos. & Pull. 150. Reardon v. Swaby, 4 East, 188. S. P.
(4) St. 48 G. 3. c. 149. See also St. 23 G. 3. c. 58. s. 3. St. 35 G. 3. c. 30. s. 1. 6. St. 37 G. 3. c. 90. s. 1. 6. 55 G. 3. c. 184. Sch. Part I. p. 498. 550.

agreement for a lease, must depend entirely on the intention of the parties, as it is to be collected from the whole of the instrument. (1) If the words are, that the one party *does* thereby demise, &c. or that the other party *shall* have, &c. and no other words appear to qualify the expression, they are to be construed as a lease. (2) And where the instrument appears to have been intended to transfer a present interest, or where it contains words of present demise, without any thing to show that the parties had in contemplation a mere executory contract, the instrument will be considered as an actual lease, notwithstanding there may be a stipulation for executing a subsequent lease under seal. (3) But, though there are words of present demise; yet if it may be collected that a future lease was in contemplation, and necessary for ascertaining the rights of the parties, the instrument is to be considered an agreement, not a lease. (4) Agreement.

3. Memorandum or agreement for the hire of any laborer, artificer, manufacturer, or menial servant. Agreement for hire of servant.

An agreement for the assignment of an apprentice from one master to another is not within the meaning of this clause; the term "hiring" not being applicable to an apprentice. (5) If such a written agreement is unstamped, it cannot be admitted in evidence, nor can parol evidence of the terms be received.

4. Memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandize. Agreement for sale of goods.

Upon this clause it has been determined, that an agreement by the defendant to take a share of some goods, which had been 1. Meaning of the words, *for or relating to.*

(1) Morgan v. Bissell, 3 Taunt. 65.
(2) Drake v. Munday, Cro. Car. 207 Maldon's case, Cro. El. 33. 5 T. R. 167.
(3) Harrington v. Wise, Cro. El. 486. Tisdale v. Sir W. Essex, Hob. 34. Baxter v. Brown, 2 Black. 973. Barry v. Nugent, cited 5 T. R. 165, 167. Pool v. Bentley, 2 Campb. 286. 12 East, 168, S. C. Tempest v. Rawling, 13 East, 18. Doe dem. Walker v. Groves, 15 East, 244.
(4) Morgan v. Bissell, 3 Taunt. 72. Doe dem. Jackson v. Ashburner, 5 T. R. 163. Coore v. Claire, 2 T. R. 739. Doe dem. Broomfield v. Smith, 6 East, 530.
(5) R. v. St. Paul's, Bedford, 6 T. R. 453. R. v. Ditchingham, 4 T. R. 769.

Agreement.

bought by the plaintiff on their joint account, and to pay for them at a certain time, is an agreement *relating to* the sale of goods, and therefore exempted from a stamp duty (1;) so also is an agreement by a broker to indemnify his principal, for whom he bought goods, from any loss on a re-sale (2;) or a guarrantee for the payment of goods, which a third person was about to purchase to a certain amount (3;) or a receipt for the price of a horse containing a warranty of soundness (4;) or an agreement to cancel a former agreement respecting a sale of goods, and for the future sale of goods upon different terms. (5)

A letter from a principal to his factor, containing bills of exchange drawn upon the factor, and engaging to provide for the bills, if certain goods in the factor's hands, or about to be placed there, remained unsold when the bills should become due, is not within the exception of the act, and requires a stamp. (6) The Court held, that the description in the act is confined to instruments which have the sale of goods for their *primary* object, and that the primary object of the letter in question was the obtaining of money upon a pledge of goods, intended to be placed in the factor's hands.

2. Sale of goods *to be made.*

An agreement for the making of machinery at a fixed price was considered, in the case of Buxton v. Bedall (7,) to be not within the exemption; on the ground, that it is not a *contract for, or relating to, the sale* of goods, but relating to the *making* of goods, and for work and labor to be done. (7) The language of the exempting clause, "Memorandum or agreement for, or relating to, the sale of any goods, wares, or merchandize," is expressed in terms the most general and comprehensive; and, perhaps, on reconsideration, may be thought to extend to contracts relating to the sale of goods, which are to be made

(1) Venning v. Leckie, 13 East, 7.
(2) Curry v. Edensor, 3 T. R. 524.
(3) Warrington v. Furbor, 8 East, 242. Watkins v. Vince, 2 Starkie, N. P. C. 369.
(4) Skrine v. Elmore, 2 Campb. 407.
(5) Whitworth v. Crockett, 2 Stark. N. P. C. 431.
(6) Smith v. Cator, 2 Barn. & Ald. 778.
(7) 3 East, 303, on showing cause against a new trial. The only Judges present were Mr. Justice Lawrence, and Mr. Justice Grose; and they determined the point on the authority of Towers v. Sir J. Osborne, a case on the statute of frauds. See this case stated in ch. 8. sect. 1.

by the seller before their delivery, no less than to contracts for the sale of goods already made. It may be observed further, that the true principle and ground of decision in the case of Towers v. Sir J. Osborne (on the authority of which the case of Buxton v. Bedal was determined) does not appear to be inconsistent with such a construction. The court of King's Bench there held, that a contract for a chariot, which a person had bespoke, was not a contract for the purchase of goods, but for the making of something not in existence, and therefore not within the 17th section of the statute of frauds; for that section speaks of acceptance of part of the goods as one of the requisites to bind the bargain, and is supposed therefore not to extend to those cases, in which the subject-matter of the contract is incapable of delivery and of part-acceptance. (1) But in the exempting clause of the stamp-act, nothing is said relative to the delivery of the goods, nor is there any reason for supposing, that the legislature intended to make a distinction, with respect to stamping, between contracts for the sale of goods ordered to be made, and contracts for such as are already made. It constantly happens, that the subject-matter is not at the time of the contract in the state in which it is to be delivered; in some cases more is to be done than in others, but still the contract appears to relate to the sale of goods, although the goods may not be at the time of the purchase in a complete state for delivery. And this is the construction which the Court of Common Pleas has put upon the clause in question, in the late case of Wilks v. Atkinson (2), in which it was determined, that a contract for the purchase of a quantity of linseed oil was not liable to a stamp, although the oil had not been made, but was to be prepared out of raw materials in the seller's possession.

Agreement.

An agreement for the sale of crops growing on certain lands, to be delivered afterwards, has been determined to be an agreement for an interest in land, and is therefore not exempted as a sale for goods. (3) In the case of Waddington v. Bristow, Mr.

3. Sale of growing crops.

(1) See Groves v. Buck, 3 Maule & Selw. 179.

(2) 6 Taunt. 11. 1 Marshall, 412. And see the opinions of Lord Alvanley C. J. and Chambre J. in Waddington v. Bristow, 2 Bos. & Pull. 454.

(3) Waddington v. Bristow, 2 Bos. & Pull. 453. Crosby v. Wadsworth, 6 East, 602.

Agreement.

Justice Chambre said, "Though I admit that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods at the time of the contract made, yet I cannot think the present agreement within the exemption, since it gives an interest to the vendee in the produce of the vendor's land." But, in a late case, where a verbal contract was made for the sale of a then growing crop of potatoes, the Court of King's Bench held, that whenever a contract is for the produce of a given quantity of land, and is a contract to render what will afterwards become a chattel, it is not a contract within the meaning of the fourth section of the statute of frauds, although some advantage may accrue to the vendee by the subject of the sale remaining in the land: and they distinguished the case from the before mentioned decision in Crosby v. Wadsworth on the ground, that there an *exclusive* right was contracted for the growing surface of the land.(1)

Agreement for seamen's wages.

5. Memorandum or agreement, made between the master and mariners of any ship or vessel for wages, on any voyage coastwise from port to port in Great Britain.

Letter containing agreement.

6. Letters containing any agreement (not before exempted) in respect of any merchandise, or evidence of such an agreement, which shall pass by the post, between merchants and other persons carrying on trade or commerce in Great Britain, and residing and actually being at the time of sending such letters at the distance of 50 miles from each other.(2)

A letter written by one, who managed another person's trade, to a creditor, promising to pay a debt which arose in the regular course, has been held to come within the letter and spirit of this exemption.(3)

(1) Evans v. Roberts, 5 Barn. & Cress. 829. And see Parker v. Staniland, 11 East, 362. Warwick v. Bruce, 2 Maule & Selw. 205.

(2) Leigh v. Banner, 1 Esp. N. P. C. 403. Stat. 32. G. 3. c. 51.

(3) M'Kenzie v. Banks, 5. T. R. 176.

CHAP. X.

Of the Admissibility of Parol Evidence to explain, vary or discharge Written Instruments.

The order in which it is proposed to treat of this intricate and extensive subject, is, First, to consider in what cases parol evidence is admissible to explain ambiguities in written instruments; Secondly, whether parol evidence is admissible to add to, vary, or discharge written instruments; and, Thirdly, to consider the rule of evidence on this subject, established in courts of equity.

Sect. I.

Of the Admissibility of Parol Evidence to explain Ambiguities.

The first section treats of Ambiguities, latent and patent, and of the admissibility of evidence of usage as explanatory of ancient grants and deeds.

Ambiguities.

There are two sorts of ambiguities of words, says Lord Bacon (1); the one is called *ambiguitas latens*, the other *ambiguitas patens*. The first occurs, where the deed or instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by evidence of something extrinsic, or some collateral matter out of the instrument; the latter kind is such as appears on the face of the instrument itself. (*l*)

First, with respect to latent ambiguities.

Latent ambiguity.

A latent ambiguity, which is raised by extrinsic evidence, may be explained in the same manner. Thus, if a person grant his manor of S. to one and his heirs, so far there appears to be no ambiguity; but if it should be proved, that the grantor has the manors both of South S. and North S., this ambiguity is matter

(1) Bac. Elem. rule 23.

(*l*) See Note, 938, p. 1358.

Latent ambiguity.

in fact, and parol evidence may be admitted to show which of the two manors the party intended to convey. (1) So, it was resolved in Lord Cheyney's case (2), if a person has two sons both baptized by the name of John, and conceiving that the elder, who had been long absent, is dead, devises his land by his will in writing to his son generally, and in truth the elder is living; in this case the younger son may in pleading or in evidence allege the devise to him, and if it is denied, he may produce witnesses to prove his father's intent, that he thought the other was dead; or that, at the time of making his will, he named his son John the younger, and that the writer left out the addition. No inconvenience, adds Lord Coke, can arise, if an averment be taken in such a case; for he who sees the will, by which land is so devised, cannot be deceived by any secret averment: when he sees the devise to the testator's son John, generally, he ought at his peril to enquire, which son the testator intended, which may easily be known by him who wrote the will, and by others who were privy to the intent; and, if no direct proof can be made of his intent, there the devise is void for its uncertainty. (*m*)

Mistake in name.

When a devise in a will is to a person, designated by a Christian and surname without any other description, and no such person appears to claim the legacy, or to have been known by the testator, parol evidence may be admitted to show, that both the names have been mistaken by the person, who took the instructions for the will; as, in the case of Beaumont v. Fell, (3), where a legacy was bequeathed to Catharine Earnley, and the name of the person who claimed the legacy was Gertrude Yardly, the Court established the claim, observing how very material it was, that no such person as Catharine Earnley

(1) Bac. Elem. rule 23.

(2) 5 Rep. 68, b. For other examples of patent ambiguities, see Altham's case, 8 Rep. 155. Hob. 32 Jones v. Newman. 1 Blackst. 60. Harris v. Bp. of Lincoln, 2 P. Wms. 136. Careless v. Careless, 1 Merrivale, 384. Doe dem. Westlake v. Westlake, 4 Barn. & Ald. 57. Doe dem. Bulkeley v. Wilford, Ry. & Mo. N. P. C. 88.

(3) 2 P. Wms. 140. See also Dowset v. Sweet, Ambl. 175. Bradwin v. Harpur, Ambl. 374. Parsons v. Parsons, 1 Ves. jun. 266. 3 Ves. 322. Smith v. Coney, 6 Ves. 42. Doe dem. Cook v. Danvers, 7 East, 303. Doe dem. Chevalier v. Huthwaite, 3 Barn. & Ald. 632.

(*m*) See Note 939, p. 1362.

claimed under the will. Here, there was no ambiguity on the face of the will, but the latent ambiguity was introduced by extrinsic evidence, and the same kind of evidence also showed, that there was a person of the name of Gertrude, whom the testator called Gatty, which name the person, who drew the will, mistook for Katty; in this case, therefore, as parol evidence was admitted to show the latent ambiguity, parol evidence was also admitted to explain it.(*n*) So, where the testator bequeathed his stock in a particular fund, and it appeared that he had not, at the time of making his will or afterwards, any stock in that fund, having sold out some time before, and purchased into another fund, evidence was admitted to show, whence the mistake arose, and the legacy was satisfied out of the new fund, into which the testator had purchased. (1) (*o*) So, where the devise was "of *all* my farm and lands, called Trogues-farm, now *in the occupation of A. C.*," the Court of King's Bench were clearly of opinion, that two closes *in the occupation of L. M.*, but forming a part of Trogues-farm, would pass under the devise; and that a written notice from the testator to L. M. had been properly admitted in evidence, to show that he considered them as parcel of his farm called Trogues farm.(2) Here the devise was sufficiently comprehensive to include the whole of the lands, and ought not to be narrowed by the defective description of the occupation.(*p*)

Latent ambiguity.

In the instances which have been just mentioned, it is to be observed, that, unless the evidence had been admitted, the will could not have taken effect.(*q*) In the first case, no person was to be found corresponding with the description in the devise; in the second, the testator had no property in the funds, out of which he appointed the legacy to be paid; and in the third, if the closes in question were not to be included as part of the devised farm, the word "all" in the devise would not be satisfied. And the question on the admissibility of parol evidence, in such cases, will depend principally upon this, namely,

Evidence, to give effect to a will.

(1) Selwood v. Mildmay, 3 Ves. 306. See 4 Ves. 676. 1 Bro. Ch. C. 472. Andrews v. Dobson, 1 Cox Ch. C. 425.

(2) Goodtitle dem. Radford v. Southern, 1 Maule & Selw. 299. Doe dem. Beach. v. Lord Jersey, 1 Barn. & Ald. 550. Doe dem. Harris v. Greathed, 8 East, 103.

(*n*) See Note 940, p. 1368. (*o*) See Note 941, p. 1376. (*p*) See Note 942, p. 1376. (*q*) See Note 943, p. 1382.

Latent ambiguity.

whether the evidence is necessary to give an effective operation to the devise, or whether, without that evidence, there appears to be sufficient to satisfy the terms of the devise, and the intention of the testator as expressed on the face of the will. If the testator has left property, which corresponds with the description in the will, extrinsic evidence is not admissible to show, that he intended to include other property not within that description.(1) (*r*)

1. With reference to the *estate.*

In the case of Whitbread v. May(2), where the testator having devised all his estates in trust for his son for life with remainder over in strict settlement, &c., by a codicil afterwards revoked his will "so far as it related to *his estate at* Lushill, in the county of Wilts, and *Hearne* and Buckland, in the county of Kent, which he devised to his son in fee," it appeared, that, at the time of the devise, the testator had lands in the parish of *Hearne* and in several other parishes, all which he had purchased by one contract from one person; evidence was then offered to show, that the testator, by the description of his "*estate at Hearne,*" meant to designate and include not only the lands in that parish, but also all the other lands which he had purchased at the same time. This evidence was received at the trial, subject to the opinion of the Court above; and the Court of Common Pleas were afterwards equally divided in opinion on the question of its admissibility.

In a much later case, however, the case of Doe on the demise of Sir A. Chichester v. Oxenden,(3) which was very similar to the last, the Court of Common Pleas adjudged such evidence to be inadmissible. The question there was, whether on a devise of the testator's "*estate of Ashton,*" parol evidence could be admitted to show, that the testator intended by that description to devise all his maternal estate, which consisted of two manors in the parish of Ashton, and another manor in the adjoining parish; the Court of Common Pleas, after hearing two argu-

(1) Doe dem. Brown v. Brown, 11 East, 441. Doe v. Oxenden, 3 Taunt. 147. Doe dem. Tyrrell v. Lyford, 4 Maule & Selw. 550. Tyler v. Dalrymple, 2 Merivale, 419.

(2) 2 Bos. & Pull. 593.

(3) 3 Taunt. 147. Doe dem. Brown v. Greening, 3 Maule & Selw. 171. Beaumont v. Field, 1 Barn. & Ald. 247.

(*r*) See Note 944, p. 1382.

ments, determined against its admissibility. The Chief Justice, Sir James Mansfield, in delivering the judgment of the court, after premising that he had felt considerable doubts on the subject in consequence of the case of Whitbread v. May, in which case the Court was equally divided on the admissibility of parol evidence, adverted to the case of Beaumont v. Fell(1), and to the similar case of Dowset v. Sweet(2), and observed on these cases, that although it was not expressly stated to have been necessary to receive the evidence in order to give effect to the will, yet that ground of determination might be inferred. "It will be found," said the Chief Justice, "that the will would have had no operation, unless the evidence had been received. But, in the case now before the Court, the will has an effective operation without the evidence proposed; every thing will pass under it, that is, in the manor or parish, or what he would naturally call his Ashton estate. This will be an effective operation; and, this being so, the case in this respect differs from all the others; because in them the evidence was admitted to explain that which, without such explanation, could have had no operation. It is safer not to go beyond this line. Only those premises, therefore, will pass under the devise, which are in the manor or parish of Ashton. Latent ambiguity.

Soon after this decision of the Court of Common Pleas, the devisee brought an action of ejectment against the heir at law, and offered at the trial the evidence before mentioned; on the rejection of which, a bill of exceptions was tendered; and the case was brought up to the House of Lords on a writ of error.(3) The question on the admissibility of the evidence was referred to the Judges; and Lord Chief Justice Gibbs delivered their unanimous opinion, that the evidence ought not to be admitted. "The courts of law," said the Chief Justice, "have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case, in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity; for example,

(1) Vide supra, p. 532.
(2) Ambl. 571.
(3) Doe dem. Oxenden v. Sir A. Chichester, 4 Dow. 65.

Latent ambiguity.

where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show, which of the Blackacres is meant; or, if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence must be received to show, which of them the testator intended. And so, also, if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show, which nephew the testator meant, by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity, is necessary to give effect to the will; and it is only in such a case that extrinsic evidence can be received. It is of great importance, that the admission of such extrinsic evidence should be avoided, where it can be done, that a purchaser or an heir at law may be able to judge, from the instrument itself, what lands are or are not affected by it. Here the devise is of all the devisor's estate at Ashton (for there is no difference between the words "estate of Ashton" and "estate at Ashton"), and he has an estate at Ashton, which satisfies the description. It is true, he has other lands, which come to him along with his estate of Ashton; but they are not therefore comprised in the words "my estate of Ashton." If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say, that you ought to receive evidence, that his intention was to devise lands out of these counties; and for the same reason, when the testator here describes the lands as his estate of Ashton, you cannot receive extrinsic evidence to extend this to other lands not of Ashton."(*s*)

2. With reference to the *devisee.*

In the case of Thomas v. Thomas(1), where the testator had devised to his grand-daughter Mary Thomas, of Llechlloyd, in Merthyr parish, it appeared, that, at the time of his death, he had a grand-daughter of the name of Elinor Evans, one of the lessors of the plaintiff, who lived in the place and parish named in the will, and also a great-grand-daughter, Mary Thomas, the defendant, the only person of that name in the family, but who lived

(1) 6 T. R. 671. And see Lord Walpole v. Lord Cholmondeley, 7 T. R. 138.

(*s*) See Note 945, p. 1383.

in another place, and had never been in Merthyr parish; the plaintiff's counsel at the trial offered parol evidence to show, that the person who drew the will, had made a mistake in the name of the devisee; and Mr. Justice Lawrence received the evidence(1), subject to the opinion of the court above on its admissibility; but as the jury were of opinion, that the name had not been inserted by mistake, and therefore found for the defendant on the first count, which laid the demise from Elinor Evans, the admissibility of this evidence did not afterwards form any part of the argument. After this finding of the jury, the question was between Mary Thomas and the plaintiff on a demise from the heir at law, and in this stage of the cause the defendant's counsel offered evidence of declarations made by the devisor previous to the making of his will, expressive of his regard for the plaintiff, and of his intention of giving her the premises in dispute. But this evidence was rejected, on the ground, that nothing dehors the will could be received, to show the intention of the testator (which could only be collected from the words of the will itself), after the removal of any latent ambiguity in the description of persons or other terms in the will. And this opinion was afterwards affirmed by the Court of King's Bench. "If there had been no person," said Lord Kenyon, "to answer the description of grand-daughter, living at Llechlloyd, in Merthyr parish, I should have rejected the description, and have said, that the devise applied to Mary Thomas; but it appears that there is another person answering that part of the description, who is also in another part of the will an object of the testator's bounty. Then, as there are two parts of the description not answering to Mary Thomas, who is named in this clause of the will, we are left to conjecture who was meant by the devisor; but the law will not allow an heir at law to be disinherited by conjecture. And with regard to the other question respecting the rejection of evidence," added Lord Kenyon, "it was properly rejected; the supposed declarations having been made by the testator long before the will was made: but had they been made at the time of making the will, I should have thought them admissible evidence." (*t*)

Latent ambiguity.

(1) See 8 Vin. Ab. 312, pl. 29; and Hampshire v. Pierce, 2 Ves. 216, cited by Lawrence, J., 6 T. R. 678.

(*t*) See Note 946, p. 1383.

Patent ambiguity.

Secondly, with respect to patent ambiguities.

Patent ambiguity.

If a clause in a deed, or will, or any other instrument, is so ambiguously or defectively expressed, that a court of law, which has to put a construction on the instrument, is unable to collect the intention of the party, evidence of the declaration of the party cannot be admitted to explain his intention; but the clause will be void on account of its uncertainty. In many cases an apparent uncertainty may be removed by collecting the general intention from other passages in the writing, so as to make the whole consistent: or by a reference to some event, or some other writing, or some medium of explanation, adverted to in the instrument. But when, after comparing the several parts of a written instrument, and collecting all the lights which the writing itself supplies, the intention of the parties still appears to be uncertain, parol evidence of their intention is not admissible. "Ambiguitas patens," says Lord Bacon (1), (that is, an ambiguity apparent on the deed or instrument) "cannot be helped by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averment, and so in effect to make that pass without deed, which the law appoints shall not pass but by deed. It holds generally," he adds, "that all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or in some cases by election,(*u*) but never by averment; but rather shall make the deed void for uncertainty."(*v*)

Uncertainty in devise.

And in the case of a will, if any devise is expressed doubtfully and with uncertainty, the only construction which it is capable of receiving, is by comparing it with the other parts of the will; the declarations of the testator are not admissible to remove the apparent ambiguity, or to explain his intention. As, for example, if the devise is to "one of the sons of J. S." who has several sons, such an uncertainty in the description of the de-

(1) Bac. Elem. rule 23. Doe dem. Lord Cholmondeley v. Lord Clinton, 2 Merivale, 343. 550. Tyrrell v. Lyford, 4 Maule & Selw.

(*u*) See Note 947, p. 1383. (*v*) See Note 948, p. 1383.

visee cannot be explained by parol proof.(1) (*w*) So in a case, where the testator made dispositions in his will to several persons, among others to his wife and niece, who were the only women mentioned in the will, and then devised "to her" a particular estate for life, the question was, whether parol evidence could be admitted, to show which of the two was intended: the Lord Chancellor refused to receive it, on the ground, that it would tend to put it in the power of witneses to make wills for testators; the Court held, that though the term "her" was relative, it was to be referred in this case to the wife, because in other parts of the will it seemed to relate to the wife; but expressly excluded the parol evidence offered to explain the will.(2) Patent ambiguity.

A blank in a will, for the devisee's name, is an instance of apparent ambiguity, and parol evidence cannot be admitted to show, what person's name the testator intended to insert.(3) But on a bequest to a person, whose surname was mentioned with a blank left for the Christian name, the party, who claimed the legacy, was allowed, not only to prove acts of kindness and constant affection on the part of the deceased, but to show further, that the testator had said, "he would provide for him, and that he had left him something by his will."(4) And in another case, where only one initial appeared in the will, the bequest being "to Mrs. G.," without any other description, the Chancellor referred it to the Master to receive evidence, to show who was the person intended to be described by that initial.(5) The distinction between these cases is, that in the former there is no description whatever of a devisee, and whether the testator had selected any person, as the object of his devise, is entirely uncertain on the face of the will; but in the last two cases, the testrtor has given some description, and though it would appear too slight and general for the information of strangers, yet to persons well acquainted with the testator it might be sufficiently full and distinct: in the first of these two cases the testator might not have known the Christian name; in the other, the description Omission of name in will.

(1) 2 Vern. 624. 8 Rep. 155. a.
(2) Castleton v. Turner; cited 2 Ves. 217.
(3) Baylis v. The Attorney-general, 2 Atk. 239. Castleton v. Turner, 3 Atk. 257. Hunt v. Hart, 3 Bro. Ch. C. 311.
(4) Price v. Page, 4 Ves. 680.
(5) Abbott v. Massie, 3 Ves. 148. Andrews v. Dobson, 1 Cox Cas. 425.

(*w*) See Note 949. p. 1394.

Patent ambiguity.

in the will might have been the only one by which the testator used to designate the claimant.

Omission in written instruments.

When a blank is left in a written agreement, which need not have been reduced into writing, and would have been equally binding, whether written or unwritten, (as if the agreement were to deliver goods to the amount of less than ten pounds, and a blank were left for the quantity of goods to be delivered,) in such a case, it is presumed, in an action for the non-performance of the contract parol evidence might be admitted, to show the quantity for which the parties agreed; for a memorandum in writing is not required in this case by the statute of frauds, and the proposed evidence would not contradict any part of the written agreement, but merely supply an omission, where nothing need have been expressed.(*x*) And where a written instrument, which was made professedly to record a fact, is produced as evidence of that fact, which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof. Thus, if a bishop's register were to be produced in evidence for the purpose of showing a presentation by a patron, under whom the plaintiff claims, and on the production of the register, a blank should appear in the place, where the patron's name is usually inserted, the presentation might be proved in some other way;(1) as by a witness who was present, and heard the presentation. So, in the case of a surrender of a copyhold by a steward, if there is any mistake in the entry, that is only matter of fact, and the courts of law will in that case admit an averment, that there was a mistake either as to the lands or uses.(2) (*y*)

Usage, to explain ancient charters, grants, &c.

Thirdly, as to the admissibility of evidence of usage, to explain ancient charters and grants.

In the construction of written instruments, words are to be understood according to their common and general acceptation at the time when the instrument was made, (3) and with reference to the nature of the subject. (*z*) If the language in ancient

(1) Bishop of Meath v. Lord Belfield, 1 Wils. 215.
(2) Towers v. Moor, 2 Vern. 98.
(3) Vaugh. Rep. 169. Com. Dig. tit. Parols (A.)

(*x*) See Note 950, p. 1394. (*y*) See Note 951, p. 1395. (*z*) See Note 952, p. 1395.

charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted to for the purpose of explanation,(1) though it can never be admitted to control or contradict the express provisions of the instrument. Such continued usage is a strong practical exposition of the meaning of the parties. And modern usage, of forty or fifty years duration, is evidence not only for that period, but evidence from which it may be presumed, if nothing is shown to the contrary, that the same course was pursued in earlier times.(2) Even in the case of an act of parliament, universal usage has been referred to as a proper expositor, where the language is doubtful.(3) (*a*) Lord Coke, in commenting on the statute of Gloucester, says, that when any claimed before the justices in eyre any franchises by ancient charter, if the words were general, and a continual possession was pleaded of the franchises claimed, or if the claim was by old and obscure words, and the party in pleading expounded them to the court, and averred continual possession according to that exposition, the entry was ever, *inquirator super possessionem et usum;* " and this," adds Lord Coke, " I have observed in divers records of those eyres, agreeably to that old rule, *optimus interpres rerum uses.*(4) And the uniform course of modern authorities fully establishes the rule, that, however general the words of ancient grants may be, they are to be construed by evidence of the manner, in which the thing has been always possessed and used.(5) Thus, on an information to set aside an election to a perpetual curacy, it appeared, that the impropriate rectory, out of which the curacy arose, had been granted in trust for the use of the parishioners and inhabitants of a parish for ever: on the part of the relators it was insisted, that the right of nomination to the vicarage ought to be confined to inhabitants paying scot and lot, or to persons paying to church

(1) R. v. Varlo, Cowp. 248. Gape v. Handley, 3 T. R. 288, n. R. v. Bellringer, 4 T. R. 810. R. v. Osbourne, 4 East, 333. Bailiff, &c. of Tewkesbury, v. Bricknell, 2 Taunt. 120. R. v. Mayor of St. Alban's, 12 East., 550. R. v. Mayor, &c. of Stratford-upon-Avon, 14 East, 348. R. v. Mayor, &c. of Chester, 1 Maule & Selw. 101. Mayor of London v. Long, 1 Campb. 22. Chad v. Tilsed, 2 Brod. & Bing. 406.

(2) By Richardson, J. 2 Brod. & Bing, 409.

(3) Sheppard v. Gosnold, Vaugh. 169; and see R. v. Scott, 3 T. R. 104.

(4) 2 Inst. 282.

(5) Weld v. Hornby, 7 East, 199. R. v. Osbourne, 4 East, 327.

(*a*) See Note 953, p. 1395.

and poor; and on the part of the defendants, that it extended to all house-keepers in general; Lord Hardwicke, in delivering his judgment, said, "that some sort of limitation was allowed by both sides to have been put by usage on the liberality of the grant, and that in the construction of ancient grants and deeds there is no better way of construing them, than by usage; and *contemporanea expositio* is the best way to go by;" and since in this case there was evidence of house-keepers having constantly voted, Lord Hardwicke held, that this usage ought to prevail.(1)

Nor does it make any difference with respect to the admissibility of evidence of immemorial usage, for the purpose of explaining and construing ancient instruments, whether the instrument be a charter granted by the crown, or merely a private deed. Thus, in the case of Withnell v. Gartham,(2) where the question was on the construction of an ancient deed, granting to the minister and churchwardens of a parish the power of appointing a schoolmaster, whether all the churchwardens must concur, or whether the act of the majority was sufficient, and the jury found the usage to be in favor of the appointment by a majority, Lord Kenyon, in speaking of the usage, and adverting to an argument which had been insisted on, (namely, that the Court ought to reject the evidence of usage, because the instances proved were not as ancient as the deed, and also because usage cannot be let in to explain a private deed,) said, that if the first reason were sufficient to reject the usage, it would be difficult to know, how far such an objection might extend. In many cases a party undertakes to prove a custom from the time of legal memory; but that proof is generally established by evidence of facts done at a much later period. And as to the second objection, Lord Kenyon said, there was no difference in that respect between a private deed and a king's charter; in both cases evidence of usage might be given to expound them.

(1) The Attorney-geneeal v. Parker and others, 3 Atk. 576. The Attorney-general v. Forster, 10 Ves. 335.

(2) 6 T. R. 388.

Thus, also, in a late case,(1) in an action for entering the plaintiff's close, where the defendant pleaded, that the close was copyhold, and justified under a grant from the lord and by a command of the copyholder; in support of this plea the defendant proved, that the person, under whom he justified, and all those whose estate he had, for a long course of years, had constantly taken the forecrop of grass and pasturage from the close, and then, by court rolls of the manor, proved admissions to a copyhold tenement "of three acres of meadow," (which was admitted to be the close in question) but every other benefit of the land, except the forecrop, had been enjoyed by those from whom the plaintiff claimed. Mr. Justice Heath, who tried the cause, was of opinion, "that, although the terms of the surrender and admission were sufficiently comprehensive to pass the soil and freehold, yet, as in ancient grants the legal import might be restrained by long and concomitant usage, which might be taken as evidence of the original intent of the parties in making the grant, so here the grant might be restrained by the received usage, and only pass the forecrop, which would not carry the soil." And the Court of King's Bench agreed in this construction of the written evidence. The terms of the admissions, they thought, were not incompatible with the plaintiff's right, and might receive a construction conformable to the usage. (*b*)

Courts of law, as well as courts of equity, will admit evidence of the situation and circumstances of the parties, for the purpose of assisting them in putting a construction on wills, that are not clearly expressed.(2) In the case of Masters v. Masters,(3) where the testator, after having bequeathed a legacy to the poor of two hospitals in Canterbury, (naming them,) bequeathed another sum in his codicil "to all and every the hospitals," the second bequest was adjudged not to be void for uncertainty, but to have been intended for all the hospitals in

Evidence as to situation or estate of party.

(1) Stammers v. Dixon, 7 East, 200. Wadley v. Baylis, 5 Taunt. 752. Lord Petre v. Blencoe, 4 Gwill. 1484.

(2) Harris v. Bishop of Lincoln, 2 P. Wms. 135. Sir J. Eden v. Earl of Bute, 3 Bro. Parl. C. 79. Doe v. Burt, 1 T. R. 701. Selwood v. Mildmay, 3 Ves. 310. 6 Ves. 396. 13 Ves. 174. 15 Ves. 514. Herbert v. Reid, 16 Ves. 481. Page v. Leapingwell, 18 Ves. 466. Doe dem. Chevalier v. Huthwaite, 3 Barn. & Ald. 632.

(3) 1 P. Wms. 420.

(*b*) See Note 954, p. 1396.

Canterbury, as it appeared in evidence that the testator lived in Canterbury, and had in his will taken notice of two hospitals in that city.

It may often be of importance to inquire, what estate the devisor or grantor had at the time of making his deed or will; for the construction may vary, in some cases, according to the estate or quantity of interest in the subject-matter.(1) If a person grant an estate for life generally without saying whether for his own life or for the life of the grantee, evidence is admissible to show, what interest the grantor had in the premises; for if he was tenant in fee, the grantee would have an estate for his own life; but, if he was tenant in tail or for life only, then the grantee would have an estate for the life of the grantor.(1) (*c*) Or, if a testator bequeath such a sum in a particular stock, it will be a specific legacy, if he has that stock at the time; not specific, if he has it not.(1) Evidence is therefore admissible, in such a case, to show, what was the state of property at the time he made his will; and the construction upon the will is one way or the other, according to the result. So, in the case of Doe on the demise of Freeland v. Burt,(2) where the question was, whether a cellar, for the recovery of which the action was brought, passed under a lease from the lessor to the defendant, as appurtenant to a yard, which was described in the lease by its abuttals, and as having been late in the occupation of A.; evidence was adjudged to be admissible, on behalf of the plaintiff, to show, that the cellar was, at the time of the execution of the lease, in the occupation of another tenant B.: here the defendant claimed the cellar, not as specifically demised, but as appurtenant to the demised yard, upon the general maxim of law, *cujus est solum, ejus est usque ad cœlum et ad inferos;*" and the proposed evidence would clearly show, it could not have been the intention of the parties, that the cellar should pass by the lease to the defendant. "Where there is a conveyance in general terms," said Mr. Justice Buller, "of all that acre called Blackacre, every thing which belongs to Blackacre passes with it; and then the rule which has been mentioned, *prima facie*

(1) See Mr. Justice Bayley's judgment, in Smith v. Doe dem. Lord Jersey, 2 Brod. & Bing. 551.

(2) 1 Term Rep. 701.

(*c*) See Note 955, p. 1398.

obtains; but whether parcel or not of the thing demised, is always matter of evidence."

Another case, in which evidence of the state and amount of the testator's property has been admitted, is the case of Fonnereaux v. Pointz; (1) (*d*) where Lord Thurlow received the evidence, not to control a bequest, which was distinctly and accurately described, but because it was uncertain, upon the whole context, whether the testator meant so much *per annum* or so much as a gross sum. Lord Thurlow decided the case, as a case of ambiguity. And Lord Alvanley, in observing on this case, says, (2) " Lord Thurlow's only doubt was, whether the parol evidence was admissible to ascertain, whether the testator did not mean capital, but *he had no doubt he must know all the circumstances of his affairs.*"(3) In the construction, however, of wills free from ambiguity, the general rule is, that evidence of the value of the estate devised, or of the amount of the testator's property, will not be admitted in order to raise an argument in favor of a particular construction; whatever may be the amount, the general rule of construction must prevail. (4)

In the case of Smith v. Doe on the demise of the Earl of Jersey, (5) lately decided by the House of Lords on a writ of error, where the principal question was on a clause of re-entry in a lease, under the execution of a power in a deed of marriage-settlement, by which the settler was authorised to demise by indenture such premises as were then leased for lives, &c. and so as the ancient accustomed rents were reserved, &c. and so as the lease contained a *power of re-entry* for non-payment of the rent reserved, &c. the House of Lords determined, that it was allowable to prove, that the usual and accustomed form of leases (by which the estate, settled in the marriage-settlement, had been demised, as well before as after the date of the settlement) had contained, *a conditional proviso of re-*

Indefinite term in a power.

(1) 1 Bro. Ch. C. 472 ; cited and commented on by Mr. Justice Bayley in Smith v. Doe dem. Lord Jersey, 2 Brod. & Bing. 552.

(2) 3 Ves. 320.

(3) On this case of Fonnereau v. Poyntz, see also 3 Merivale, 319, 320.

(4) Doe dem. Handson v. Fyldes, Cowp. 833. Standen v. Standen, 2 Ves. jun. 593. Richardson v. Edmonds, 7 T. R. 640. Doe v. Dring, 2 Maule & Selw. 455. Bootle v. Blundell, 1 Merivale, 216. Jones v. Tucker, 2 Merivale, 537. Attorney-general v. Grote, 3 Merivale, 316.

(5) 2 Brod. & Bing. 473.

(*d*) See Note 956, p. 1398.

entry similar to the one in the indenture, whose validity was then disputed. "This evidence," said Mr. Justice Bayley, in his judgment in the House of Lords,(1) "is not admitted, to produce a construction contrary to the direct and natural meaning of the words; not to control a provision, which was distinct, and accurately described; but because there is an ambiguity upon the face of the instrument," (for the deed of settlement required the leases to contain *a power of re-entry* generally, *on non-payment of rent*, and there are various forms of powers of re-entry;) "because an indefinite expression is used, capable of being satisfied in more ways than one. I look to the state of the property at the time, to the estate and interest which the settler had, and the situation in which the settler stood with regard to the property settled, to see, whether that estate, or interest, or situation, will assist us in judging what the settler meant by that indefinite expression."(*e*)

Reference, in the writing, to extrinsic fact.

Where the subject of a devise is described, by reference to some extrinsic fact, it is not only competent, but absolutely necessary, to admit extrinsic evidence for ascertaining that fact, and, through that medium, to ascertain the subject of the devise. This is not done with a view to explain the will, or add to its contents. The evidence is intended only to ascertain what is included in the description which the testator has given of the thing devised. When there is a devise of an estate purchased by A., or of a farm in the occupation of B., it must be shown by extrinsic evidence, what estate it was that A. purchased, or what farm was in the occupation of B., before it can be known what is devised.(2) So, where a testator made a direction in his will, respecting a certain payment for a house, which amounted in effect to a devise of so much of the produce of timber, ordered to be cut down, as should be sufficient to pay for the house, the Master of the Rolls held, that there was nothing in the fact referred to, (namely, an antecedent order for cutting down timber) which could justly make it less a subject of extrinsic evidence, than the facts in the other cases above alluded to. The moment it is shown that it was a given number of trees, or a quantity of trees amounting to a certain fixed value,

(1) 2 Brod. & Bing. 553. 5 Barn. & Ald. 387.

(2) 1 Merivale, 653, by Sir W. Grant.

(*e*) See Note 957, p. 1399.

on a certain estate, that the testator had ordered to be cut down, the subject of the devise is rendered as certain as if the number, value or situation of the trees had been specified in the will.(1) (*f*)

It appears from some of the cases above cited, that the words of an instrument, in themselves conveying a general right to an estate, may in certain cases be limited and restrained by the manner in which the estate has for a length of time been actually enjoyed. But in the construction of a legal instrument where the question is, whether a party is bound by his covenant to do a certain act, (as, for example, to grant a renewal of a lease,) courts of law will not consider the acts of the parties or their interpretation of the instrument. In one case, indeed, where it was doubtful, whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively, the Court of King's Bench held, that the legal effect was a perpetual renewal, on the ground that the parties themselves had, by their own acts, put a construction on the covenant, and that the Court could not say the contrary.(2) But this case has been frequently disproved of,(3) and a different rule is now established. "It cannot be a legal mode of construction (said the Master of the Rolls, in a case of this kind,) that a party who has done an act, which he was not bound to do, or from a mistake, should therefore be bound forever without the power of retracting."(4) (*g*)

Covenant not to be construed by the party's acts.

Sect. II.

Of the Admissibility of Parol Evidence to vary or discharge Written Instruments.

It is a general rule of law, that parol evidence cannot be admitted to contradict, add to, or vary the terms of a will, deed, or other written instrument. First, with respect to wills;

(1) Sandford v. Raikes, 1 Merivale, 646, 658.
(2) Cooke v. Booth, Cowp. 819.
(3) Baynham v. Guy's Hospital, 3 Ves. 498. Eaton v. Lyon, 3 Ves. 694. Iggulden v. May, 9 Ves. 333. 7 Bos. & Pull. New Rep. 452. S. C. Clifton v. Walmsley, 5 T. R. 566.
(4) Moore v. Foley, 6 Ves. 238.

(*f*) See Note 958, p. 1420. (*g*) See Note 959, p. 1425.

Wills.

The statutes of the 32d and 34th of Henry VIII., which gave the power of devising lands by a last will and testament in writing, must clearly have intended, that what ever is effectual and to the purpose, ought to be in writing, and sufficient without the aid of words not written; and therefore no parol evidence of the testator's intention can be admitted to control or enlarge the terms of the will.(1) An additional reason for this rule is supplied by the statute of frauds, which enacts, that all devises of lands, &c. must be in writing, and are not revocable except by some other will or codicil, or by some act, as cancelling, &c. And with regard to wills of personal property, it is evident from the 22d section of the statute of frauds, that no unwritten declaration of the testator can be admitted to vary any bequest; for that section enacts, "that no will in writing concerning goods, chattels, or personal estate, shall be repealed, and that no clause shall be altered or changed, by any words or will by word of mouth only, except the same be in the lifetime of the testator committed to writing, and after the writing read to the testator, and allowed by him, and proved to be so done by at least three witnesses.(2) (*h*)

Deeds.

Parol evidence is not admissible to contradict, or vary or add to, the terms of a deed.(3) "It would be inconvenient," says Lord Coke, "that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others in such cases, if such made averments against matter in writing should be admitted.(*i*) In an action of debt, therefore, on a bond conditioned to pay a sum of money on a certain day, the defendant cannot show, that the bond was intended as an

Nature of bond.

(1) Brett v. Rigden. Plowd. Com. 345. Lord Cheney's case, 5 Rep. 68. Bertie v. Lord Falkland, 1 Salk. 231. 2 Vern. 333, S. C. Stevenson v. Heathcote, 1 Eden. 38. Gall v. Croft, 1 Dickins, 23. 1 Brown's C. C. 84. Mabank v. Brooks, 1 Dickins, 577. Eden v. Smith, 5 Ves. 341. 8 Ves. 22. 13 Ves. 376. Herbert v. Reed, 16 Ves. 481.

(2) Brown v. Selwin, Forrest. 240. Lowfield v. Stoneham, 2 Stra. 1261. Cambridge v. Rous, 8 Ves. 22.

(3) Countess of Rutland's case, 5 Rep. 26. For examples, see Buckler v. Millerd, 2 Ventr. 107. Tinney v. Tinney, 3 Atk. 8. 1 Wills. 34. Lord Irnham v. Child, 1 Dickins, 554. Brydges v. D. of Chandos, 2 Ves. 417. Haynes v. Hare, 1 H. Black. 659. Clifton v. Walmsley, 5 T. R. 567. Ex parte Hooper, 2 Rose B. C. 328.

(*h*) See Note 960, p. 1425. (*i*) See Note 961, p. 1428.

indemnity against another bond. (1) (*j*) A deed of assignment, which is expressly alleged in the body of the deed, to be made in consideration of a certain sum of money paid down at the time of the execution, estops the assignor from showing that no money passed. (2) A memorandum, indorsed on the deed, of the receipt of the money, is of a different description, and, not being under seal, will not amount to an estoppel, but is evidence for the jury, capable however of being rebutted by the other circumstances of the case. (3) (*k*) Consideration. Receipt indorsed.

In an action on a bond a party will not be permitted to show a condition, different from that expressed in the bond; and a conveyance cannot be averred by parol to be to another use or intent than that expressed in the conveyance. But there is a difference in this respect between an use and a consideration. It is an established rule, that a party may aver another consideration, which is consistent with the consideration expressed; but no averment can be made contrary to, or inconsistent with, that expressed in the deed. (4) Thus, if a deed of bargain and sale is expressed generally to be made "for divers good considerations," it may be averred, that the bargainee gave money or other valuable consideration. (5) That such an averment may be taken, which stands with the deed, says Lord Coke, although it be not expressly comprised in the deed, is proved by the case of Villers and Beamont, (6) where the consideration in a deed of bargain and sale of lands was stated to be a sum of money, but it was averred and found by the jury, that the indenture was made "as well in consideration of marriage (to make it a jointure in bar of dower) as of the said sum of money;" and it was adjudged, that, although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and 1. Proof of another consideration.

(1) Mease v. Mease, Cowper, 47. Fitzgibb. 75.
(2) Rowntree v. Jacob, 2 Taunt. 141. Lampon v. Corke, 5 Barn. & Ald. 606. Baker v. Dewey, 1 B. Cr. 707.
(3) 5 Barn. & Ald. 611.
(4) 2 Roll. Abr. 786, (N), pl. 1. Mildmay's case, 1 Rep. 176. Lord Cromwell's case, 2 Rep. 76. Bedell's case, 7 Rep. 38. Willes, 677. 17 Ves. 192.
(5) 2 Roll. Abr. 786, (N). 1 Rep. 176.
(6) 2 Dyer, 146, a. Vernon's case, 4 Rep. 3, S. P. And see Craythorne v. Swinburne, 14 Ves. 170.

(*j*) See Note 962, p. 1437. (*k*) See Note 963, p. 1437.

which was not contrary to it.* *A fortiori*, adds Lord Coke, the averment may be made, where no consideration is mentioned, but the deed is general, "for divers good considerations;" for then the averment (that the bargainee gave money, &c.) is but an explanation and particularising of the general words of the deed, which include every manner of consideration; and in all these cases, the matter so averred is traversable and issuable. And Lord Hardwicke has held, that where no consideration is expressed in the deed, a party claiming the benefit of a trust under the deed, may prove a valuable consideration. (1) (*l*)

In a case of settlement also, where the question was, whether a settlement had been gained by the purchase of an estate within the statute 9 G. 1, c. 7, s. 5, parol evidence was adjudged to be admissible, to show, that the parties, after having agreed upon twenty-eight pounds as the purchase money, (which was the consideration expressed in the deed of conveyance) made a subsequent unwritten agreement before the execution of the deed, that the consideration should be increased to thirty pounds, and

(1) Peacock v. Monk, 1 Ves. 128.

* In the case of Villiers and Beamont, above cited. (2 Dyer, 146, a.) an elaborate argument is to be found in support of the position, that "where a consideration is expressed in a deed of gift or grant, no other cause can be averred; but, if no cause is expressed, that a cause may then be averred out of the deed." The report adds, "that three Judges argued to the contrary, and that the effect of that which is found by the assignment of, 'as well in consideration of the said marriage, &c. as of the sum,' &c. *is contained within the indenture, and so their finding is not contrary to it.*" In the case of Peacock v. Monk, (1 Ves. 128,) Lord Hardwicke makes the same distinction. A bill in that case was filed, claiming the benefit of a trust under a deed, and the point was, whether the plaintiff could prove a valuable consideration, as no consideration was expressed in the deed. Lord Hardwicke held, that the proof ought to be read. "It differed," he said, "from the common case, upon which the objection is founded; for, to be sure, where any consideration is mentioned, as of love and affection only, if it is not said also, 'for other considerations,' you cannot enter into proof of any other; the reason is, because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed." All the authorities agree, that, where the deed is not impeached for fraud or other illegal matter, no consideration can be averred or proved contrary to that expressed in the deed; and further, the cases referred to in the text appear to have established, that it is not considered to be contrary to or inconsistent with a deed, to prove another consideration in addition to the consideration expressed.

(*l*) See Note 964, p. 1441.

that the latter sum was actually paid. (1) Here the object of the proposed evidence was not to contradict the indenture, but to ascertain an independent collateral fact, namely, whether thirty pounds had been *bona fide paid*, as a consideration for the purchase of the estate, upon which fact the settlement would depend. (*m*)

2. Proof of different consideration, in cases of fraud, &c.

The general rule is, that a party to a deed will be precluded from showing a condition or consideration contrary to what is expressed in the deed. (*n*) An exception, however, is always to be made, where the consideration has been illegal, as for simony, usury, compounding of felony, &c. (2) (*o*) In an action of debt upon a bond, the defendant may plead, that the bond was given for an usurious consideration, though a different and a legal consideration may be recited. (3) (*p*)

Usury.

Fraud.

Considerations.

When fraud is imputed, the party insisting on the fraud may prove any consideration, however contrary to the averment in the deed, to show the fraudulent nature of the transaction. (*q*) Thus, where the considerations, mentioned in the deed, were ten thousand pounds and natural love and affection, the lords commissioners of the great seal directed an issue to try whether natural love and affection formed any part of the consideration, the estates conveyed by the deed being worth thirty thousand pound. On an appeal, this was confirmed; and the jury, on the trial of this issue, finding that natural love and affection constituted no part of the consideration, the deed was afterwards set aside by the Court of Chancery. (4) So, when the question is, whether a person has gained a settlement in a parish by purchasing an estate, within the statute 9 G. 1, c. 7, s. 5, evidence is admissible, to show, that less than thirty pounds was the consideration, though the deed of conveyance may express a greater consideration; for that act of parliament says, that no

(1) R. v. Scammonden, 3 T. R. 474, cited in Rich v. Jackson, 6 Ves. 337, n.

(2) Buckler v. Millerd, 2 Ventr. 107. Collins v. Blantern, 2 Wils. 347. Bull. N. P. 173. Paxton v. Popham, 9 East, 408.

(3) Buckler v. Millerd, 2 Ventr. 107. A deed may be avoided on the ground of fraud: but then the objection is not to come from one who is party or privy to it; for no man can allege his own fraud, in order to invalidate his own deed. 3 Barn. & Ald. 369.

(4) Filmer v. Gott, 4 Bro. Parl. C. 234, 2d edit.

(*m*) See Note 965, p. 1444. (*n*) See Note 966, p. 1445. (*o*) See Note 967, p. 1445. (*p*) See Note 968, p. 1447. (*q*) See Note 969, p. 1448.

person shall gain a settlement, &c. by virtue of any purchase, unless the consideration for such purchase shall amount to the sum of thirty pounds *bona fide paid.*(1)(*r*).

Fraud.

For the purpose of setting aside a will on the ground of fraud, parol evidence may be given of what passed at the time of the testator's signing, and what the testator said; as in the case of

Will.

Doe on the demise of Small v. Allen,(2) where it was proved, that the testator, at the time of the execution, asked, whether the contents of the will were the same as those of a former will, the answer to which was in the affirmative, when in fact the contents were different.(*s*) So, where indentures or other writings are not available in evidence, unless the consideration paid or contracted for is truly stated, it may be proved, that a greater sum than is mentioned was actually paid, or that the writing does not contain the whole of the agreement, but that some of the terms of the agreement were omitted, for the purpose of evading the provisions of the stamp acts. In these and similar cases, the general reason against admitting parol evidence will not apply; the danger is, not that the admission of such evidence would introduce fraud or uncertainty, but that fraud would be assisted by its exclusion, the whole object of the evidence being to expose and defeat a secret fraud.

But although a party, who impeaches a deed for fraud, may prove a different consideration, the party, charged with the fraud, will not be allowed to prove any other consideration in support of the instrument. Thus, where a bill was filed to set aside, as fraudulent, a conveyance, expressed to be made in consideration of an annuity, and on the part of the defendants it was objected, that the grantor of the estate had often declared, "he would rather that his kinsman, one of the defendants, should have the estate in consideration of this annuity, than any other person for a more valuable consideration, and that he was willing to give the premises to his kinsman;" the Master of the Rolls, after stating, that the deed and the answer had put the defence on another ground, declared, that it would be of mischievous consequence, and liable to the danger of perjury, which the

(1) R. v. Mattingly, 2 T. R. 12 R. (2) 8 T. R. 147.
v. Olney, 1 Maule & Selw. 387.

(*r*) See Note 970, p. 1451. (*s*) See Note 971, p. 1451.

statute of frauds intended to prevent, to suffer parol evidence to prove blood and kindred to have been the consideration of this conveyance. (1) (*t*)

3. Proof of delivery of deed at a different time.

As a deed takes effect from the time of delivery, not from the time of the date, it may be proved to have been delivered either before or after the day, when it purports to have been made. In an action of debt upon a bond, the plaintiff may declare on a bond bearing date on a certain day, and prove the delivery on another day; (2) or may state in his pleading, that the deed was intended, made, and concluded, on a different day, from that on which the deed itself professes to have been indented and concluded. (3) (*u*)

4. Proof of customary right, not expressed in deed.

Extrinsic evidence may sometimes be admitted to establish a customary right between a landlord and tenant, though such customary right is not expressed in the deed or lease, provided that it is not inconsistent with any of the stipulations. Thus, it may be shown, that a heriot is due by custom on the death of a tenant for life, though not expressed in the lease. (4) And a lessee by deed may be entitled to an away-going crop by the custom of the country, though no such right is reserved by the deed. This was determined in the case of Wigglesworth v. Dallison, (5) which was an action of trespass for cutting down corn, which the plaintiff claimed as his away-going crop after the expiration of a lease by deed. The jury found the existence of the custom; and it was afterwards moved, in arrest of judgment, that such a custom was repugnant to the deed; and to that effect a case was cited, which had been determined ten years before by Mr. Justice Yates. But the Court of King's Bench held, that the custom was not repugnant. They considered such a customary right as consequential to the taking, in the same manner as a heriot may be due by custom, though not mentioned in the grant or lease. The right was entirely collateral, and not excluded by the deed,

(1) Clarkson v. Hanway, 2 P. Wms. 203. 2 Schoal. & Lef. 501. Doe dem. Roberts v. Roberts, 2 Barn. & Ald. 368.

(2) Goddards case, 2 Rep. 4 b.

(3) Stone v. Bale, 3 Lev. 348. Hall v. Cazenove, 4 East, 477.

(4) Per Cur. in White v. Sayer, Palm. 211.

(5) 1 Doug. 201. This judgment was affirmed in the Exchequer Chamber. As to this case, see Huges v. Gordon, 1 Bligh, 287, and Clinan v. Cooke, 1 Schoal. & Lef. 22.

(*t*) See Note 972, p. 1451. (*u*) See Note 973, p. 1453.

which contained no stipulation whatever applicable to the subject. (1) But where the lease contains a covenant, which in express terms, or by plain and necessary implication, excludes the customary right, there the benefit of the custom is waived, and cannot be claimed consistently with the stipulations of the lease. (2) (*v*)

5. Evidence not admissible to vary the time of holding.

A demise of lands by deed, to commence from *Michaelmas-day*, must be understood to be from *New Michaelmas*, since the act of Parliament for altering the style unless there is some refference in the deed to a prior holding from *Old Michaelmas*, to show what the parties intended by using generally the term *Michaelmas-day*. The general term, *Michaelmas*, being thus fixed by law to mean New Michaelmas, and nothing appearing in the deed, from which a different use of the term can be presumed, no parol evidence can be received to explain the time of holding stated in the deed. (3) But if the holding has been from Michaelmas-day to Michaelmas-day, or from Lady-day to Lady-day, under a *parol* lease, and no evidence is produced, on the part of the plaintiff, to show, whether the parties intended the New Lady-day, or the Old, in such a case evidence is admissible, on the part of the defendant, of the custom and usage in the country, that such holdings are always understood to be from Old Lady-day. (4) (*w*) And in the case of old parol tenancies from year to year, where the time of entry cannot be ascertained, and where the receipts of rent have been general, such evidence seems not unreasonable.

Policies of insurance. Charter-parties.

Policies of insurance are within the same rule, and cannot be contradicted or varied by any written agreement made by the parties before the time of signing the policy. Thus, in an

(1) The case of Senior v. Armitage, Holt's N. P. C. 197, is another instance.

(2) Webb v. Plummer, 2 Barn. & Ald. 746.

(3) Doe dem. Spicer v. Lea, 11 East, 312. In this case, the tenant first held from *Old Michaelmas* by parol, then took a lease by deed from *Michaelmas*, and, after the expiration of that lease, held on without any new agreement.

(4) Such evidence was admitted by Lord Kenyon, in the case of Furley dem. Mayor of Canterbury v. Wood, 1 Esp. 198, cited by counsel in Doe v. Lea, 11 East, 312. Upon its being cited, the Court asked whether the lease was by deed. The report does not state that fact. This case of Furley v. Wood was cited, and approved of by the Court of King's Bench, in Doe dem. Hall v. Benson, 4 Barn. & Ald. 588, which warrants the position in the text. The Court of King's Bench made a distinction, in the latter case, between leases by *deed* and leases by *parol*. And see Doe dem. Peters v. Hopkinson, 3 Dow. & Ryl. 507.

(*v*) See Note 974, p. 1454. (*w*) See Note 975, p. 1457.

early case, where in an action on a policy of insurance from Archangel to Leghorn, the defendant attempted to show, that the agreement before the subscription of the policy was, that the adventure should begin only from the Downs, the Court would not admit the evidence.(1) Lord Chief Justice Pemberton in that case said, that policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he who subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say, it was agreed to be on condition, &c., when it may be that the bill had been negotiated; for though neither of them are specialties, they are of great credit, and much for the support and advantage of trade. The same rule of course applies to charter parties. In a case where a ship was chartered to wait for convoy at Portsmouth, Lord Kenyon would not suffer a parol agreement to be set up on the other side to substitute Corunna for Portsmouth.(2)

Promissory note.

In an action on a promissory note or bill of exchange, the defendant will not be allowed to give evidence of an agreement between him and the plaintiff, at the time of making the note, that it should be renewed, and that payment should not be demanded on its becoming due.(3) Nor is a parol evidence admissible to show, that a note, puporting to be payable on demand, was intended by the parties to be payable only on a contingency;(4) or that a note, payable on a certain day, was intended to be payable on some other day.(5) That the note was given on an illegal consideration may certainly be proved, for a reason before mentioned;(6) but no parol evidence can be received inconsistent with the terms of the note.(*x*) The usage in a public office, from which the note or bill issues, will not be allowed to control the legal import of the instrument.(7)(*y*)

(1) Kaines v. Knightly, Skin. 54. S. C. referred to in Bates v. Grabham, 2 Salk. 444, but misstated. Weston v. Emes, 1 Taunt. 115. Uhde v. Walters, 3 Campb. 16.

(2) Leslie v. De la Torre, cited 12 East, 583.

(3) Hoare v. Graham, 3 Campb. 57. Hogg v. Snaith, 1 Taunt. 347.

(4) Rawson v. Walker, 1 Starkie, N. P. C. 361. Woodbridge v. Spooner, 3 Barn. & Ald. 233.

(5) Free v. Hawkins, 1 Moore's Rep. C. P. 535. 8 Taunt. 92, S. C.

(6) See ante, p. 550.

(7) Hogg v. Snaith, 1 Taunt. 347.

(*x*) See Note 976, p. 1458. (*y*) See Note 977, p. 1462.

Contract for seamen's wages.

In the case of contracts of hiring also, between masters of ships and seamen, (though they are directed by statute to be in writing, under a penalty to be inflicted on the master, and it has not been decided that they are void if unwritten,) still, when once reduced into writing, they cannot be varied or added to by parol. Thus, it was ruled in the Court of Common Pleas, that a mate in a slave-ship could not, on the ground of a verbal promise, claim the perquisite of the price of a negro slave beyond the wages due to him by certain written articles of agreement, executed between the master, officers, and crew.(1)(z)

Usage of merchants, to explain mercantile contracts.

However, it has been long determined by a variety of cases, that mercantile contracts, such as policies of insurance, charter-parties, and others of a like nature, are to be construed conformably with the usage and custom of merchants. On mercantile contracts relating to insurance, said Lord Hardwicke in a case before him, courts of law examine and hear witnesses, as to the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction.(2) Thus, where an insurance was on a ship from London to the East Indies, warranted to depart with convoy, the Court held, that this clause of warranty must be construed according to the usage among merchants; that is, from such place where convoys are to be had, as from the Downs.(3) So, where the insurance is on goods till landed, and the defence is, that the plaintiff has been guilty of unreasonable delay in landing, the question can only be decided by knowing the usual practice of the trade, with which every underwriter is supposed to be acquainted, whether the practice has been recently or long established.(4)

It has indeed been doubted by Judges of the highest authority, whether the practice of admitting such evidence has not

(1) White v. Wilson, 2 Bos. & Pull. 116.

(2) 1 Ves. 459. 2 Ves. 331. Edie v. East India Com. 2 Burr. 1216. Chaurand v. Angerstein, Peake, N. P. C. 43. Cochran v. Rethberg, 3 Esp. N. P. C. 121. Uhde v. Walters, 3 Campb. 16. Birch v. Depeyster, 1 Starkie, N. P. C. 210. 4 Campb. 385, S. C. The cases on this subject are stated in Park's Treat. on Insurances, p. 49—101, last edit.

(3) Lethulier's case, 2 Salk. 443.

(4) Noble v. Kennoway, 1 Doug. 510. Vallance v. Dewar, 1 Campb. 503.

(z) See Note 978, p. 1462.

been carried to an inconvenient length. In the case of Anderson v. Pitcher,(1) Lord Eldon, C. J. expressed himself in the following terms: "It is now too late to say, that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that, in policies of insurance, parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great Judge Lord Holt.(2) It is true, indeed, that Lord Mansfield, who may be considered the establisher, if not the author, of a great part of this law, expressed himself thus: 'Wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms.'(3) Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned."(*a*)

But though the usage of merchants, with reference to which the parties are supposed to contract, may be frequently resorted to for explaining or defining the terms of a policy, it is not therefore to be supposed, that this species of contract is not subject to the same rules of construction as are applicable to other written instruments. The same rules of construction apply to every kind of contract. The terms of a policy are to be understood in their plain, ordinary, and proper sense, unless they have generally, in respect to the subject-matter, (as by the known usage of trade, or the like,) acquired a peculiar sense distinct from the popular sense of the words: or unless the context evidently points out, that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense.(4) Proof of usage is not admissible to contradict the plain unequivocal language of a policy; and therefore in an action on a policy of insurance "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and

(1) 2 Bos. & Pull. 168.
(2) Lethulier's case, 2 Salk. 443.
(3) Lilly v. Ewer, 1 Doug. 74.
(4) By Lord Ellenborough, C. J. in delivering his judgment in Robertson v. French, 4 East, 135. Birch v. Depeyster, 4 Campb. 385. Chaurand v. Angerstein, Peake, N. P. C. 43.

(*a*) See Note 979, p. 1462.

safely landed," evidence having been admitted, that by the custom of the trade the risk on the goods, as well as on the ship, expired in twenty-four hours, the Court of King's Bench granted a new trial on that ground, and on the new trial the evidence was rejected.(1) Evidence of usage of trade, which contradicts the express words of a contract, is clearly inadmissible.(2) (*b*)

This doctrine of admitting evidence of usage to explain and construe mercantile contracts is strongly illustrated by the case of Cutter v. Powell,(3) which was an action of assumpsit brought by an administratrix for work and labor done by the deceased. It appeared that the captain of a ship had given a note to the deceased, by which he promised to pay a sum of money to the deceased, provided that he proceeded on a voyage, and continued to his duty as second mate, the port of destination. The second mate died on the voyage, and the question was, whether the plaintiff could recover in this general action any portion of the wages for the time the deceased had served. An inquiry had been made by the direction of the Court relative to the usage of merchants on this kind of agreement; but no settled usage could be ascertained one way or the other. Lord Kenyon, in delivering his opinion, after stating that the deceased stipulated to receive the larger sum, if the whole duty were performed, and, unless the whole were performed, to receive nothing, added, that on this particular contract his opinion was at present formed; at the same time, said Lord Kenyon, if we were assured, that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my opinion. And Mr. Justice Lawrence said, "With regard to the common case of an hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he does not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage, that persons in the situation of

(1) Parkinson v. Collier, sitt. after Mich. 1797, Park. Insur. 416.

(2) Yeates v. Pim, 2 Marshall's R. 141. Holt, N. P. C. 95, S. C.

(3) 6 T. R. 320.

(*b*) See Note 980, p. 1463.

this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, the plaintiff cannot recover any thing."

Agreements within the statute of frauds.

The same rule applies to all such written agreements as are required by the statute of frauds to be in writing. They cannot be contradicted, or added to, or substantially varied, by parol evidence; (1) such evidence would defeat the statute, and introduce that uncertainty, which it was the object of the legislature as far as possible to suppress. Where the rent for a house was specified in a written agreement to be twenty-six pounds a year, and the landlord, in an action for use and occupation, proposed to show by parol evidence, that the tenant had also agreed to pay the ground-rent, the Court refused to admit the evidence. (2)* So, where a tenant having paid the land-tax, brought an action to recover it back from his landlord, and gave in evidence a written memorandum of agreement in the plaintiff's hand-writing, which specified the rent and terms, but was silent respecting the payment of taxes; and the defendant offered parol evidence, that, previously to the drawing up of the memorandum, it had been mentioned and was understood by the parties, that the rent was to be paid clear of all taxes: this evidence was rejected, and the Court of Common Pleas afterwards, on a motion for a rule to show cause, why the verdict should not be set aside, adjudged the evidence to be inadmissible, and refused the rule. (3)

(1) Binstead v. Coleman, Bumb. 65. Parteriche v. Powlet, 2 Atk. 383. Portmore v. Morris, 2 Br. C. C. 219. Hare v. Shearwood, 1 Ves. 241. Jackson v. Cater, 5 Ves 628. 7 Ves. 218. Meres v. Ansell, 3 Wils 275. Wain v. Warlters, 5 East, 16. Hope v. Atkins, 1 Price, 143. Bartlett v. Pickersgill, 1 Cox, Ch. C. 15.

(2) Preston v. Merceau, 2 Black. 1249.

(3) Rich v. Jackson, 4 Bro. Ch. C. 515. 6 Nes. 334, n , S. C.

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* In the case of Preston v. Merceau, above cited, Mr. Justice Blackstone after stating, that the Court could neither alter the rent nor the term, the two things expressed in the agreement, is reported to have added, "that, with respect to collateral matters, it might be different; the plaintiff might shew, who was to put the house in repair, or the like, concerning which nothing is said." But this opinion is not consistent with the principle established in Meres v. Ansell, (3 Wils. 275,) Rich v. Jackson, (4 Bro. Ch. C. 515,) Powell v. Edmonds, (12 East, 6,) and several other cases above mentioned, which plainly show, that parol evidence is not admissible either to vary, or to add to, the terms of the written agreement. To add a new term, or to define what was before indefinite, is in effect to make a material variation.

Upon the same principle, the verbal declarations of an auctioneer at the time of sale are not admissible in evidence for the purpose of varying, or adding to, or explaining the printed conditions of sale.(1) (c) Thus, where the conditions described only the number and kind of timber trees to be sold by lot, but said nothing as to the weight of the timber, the defendant in an action for not completing his purchase according to the conditions, was not allowed to prove, that the auctioneer at the sale had warranted the quantity of timber to amount to a certain weight, and the Court of King's Bench was of opinion, that this evidence had been properly rejected.(2) Lord Ellenborough said, "the purchaser ought to have had it reduced into writing at the time, if the representation then made, as to the quantity, swayed him to bid for the lot. If the parol evidence were admissible in this case, in what instance might not a party by parol testimony superadd any term to a written agreement?—which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of timber would vary the agreement contained in the written conditions of sale."

When a contract is made for the sale of goods, and the bargain has been reduced into writing, pursuant to the seventeenth section of the statute of frauds, parol evidence would not be admitted to show, that the parties agreed to vary the quantity of goods to be delivered. But the rule is different with respect to the time of delivery, or the particular mode of delivery, which are not essential parts of the contract, but are frequently expressed in the memorandum, together with the quantity and the price of the goods, in order the more easily to carry the contract into execution; proof of a verbal agreement has therefore, been allowed to prolong the time, limited in a written contract, for the delivery of a certain quantity of barley; (3) on the ground, that it was only a continuance of the original contract, and a forbearance on the part of the plaintiff for a

(1) Gunnis v. Erhart, 1 H. Bl. 289. Jenkinson v. Pepys, cited 6 Ves. 330. Higginson v. Clowes, 15 Ves. 516 Clowes v. Higginson, 1 Ves. & Beam. 524. Winch v. Winchester, 1 Ves. & Beam. 328. Ogilvie v. Foljambe, 3 Merivale. 53.

(2) Powell v. Edmonds, 12 East, 6.

(3) Warren v. Stagg, ruled by Buller, J., cited in 3 T. R. 591.

(c) See Note, 981, p. 1463.

longer time. And in a very late case, where the question was, whether, after a part-delivery of goods, which, by a written contract, were to be delivered at fixed times, a verbal agreement, to extend the time for the delivery of the remainder, was good, the Court of King's Bench held, that it was good; (1) for this was not a parol variation of the contract, but what had been done was only in performance of the original contract: the parties agreed to a substitution of other days, instead of those originally specified for its performance, but still the contract remained. (*d*) Parol evidence is also admissible to show that a written contract, purporting to be made between A. and B., as seller and buyer, was in fact made by B. not on his own account, but as agent for a third person. (2) (*e*)

Contracts within statute of frauds.

By the rule of law, independently of the statute of frauds, parol evidence cannot be received to contradict a written agreement; the written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol. (3) The reason assigned by Lord Coke against admitting parol evidence to contradict the terms of a deed, is very general, and applies to the case of a written agreement, though writing may not have been absolutely necessary. "It would be inconvenient," he says, "that matters in writing, made on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of the parties, to be proved by the uncertain testimony of slippery memory." (4) Thus, where there has been a contract in writing for the sale of goods, specifying the quantity and the price, neither of the contracting parties would be allowed to give evidence of conversations *previous to*, or *contemporaneous with* the bargain, for the purpose of proving that the price was to be different, or that a different quantity was to be delivered; for this evidence would directly contradict the written memorandum, which must be considered as expressing the final intention and understanding of the parties at the time of the contract. For the same reason, if the time of

(1) Cuff v. Penn, 1 Maule & Selw. 21.
(2) Wilson v. Hart, 7 Taunt. 295. 1 Moore, C. P. 45, S. C.
(3) 2 Atk. 383 Sayer, 189. 2 Bro. Ch. C. 219. 7 Ves. 218. 4 Taunt. 786. 2 Barn. & Cress. 634.
(4) 5 Rep. 26.

(*d*) See Note 982, p. 1463. (*e*) See Note 983, p. 1464.

carrying away the goods is not expressed in the agreement, in which case a reasonable time is allowed, evidence will not be admitted to show, that the purchaser verbally agreed to carry them away immediately after the purchase. (1) (*f*)

But if it were not necessary in the first instance to have the bargain reduced into writing, evidence of conversations *subsequent* to the time of making the agreement would probably be admitted, to show that the parties agreed afterwards to vary the contract, or add some new stipulation. Here the written agreement, so far it purports to express the true meaning of the parties, that is, down to the time of its being concluded, is not in any manner contradicted or impugned; but from the proposed evidence it would appear, that they afterwards varied, or added to, the contract; which is not inconsistent with any thing contained in the original agreement. (*g*) Lord Hardwicke is reported to have said in a case before him, (2) that "to add any thing to an agreement in writing, by admitting parol evidence, which would affect land, is not only contrary to the statute of frauds, but to the rule of common law, before that statute was in being." It is not, however, expressly stated in the report of the case before Lord Hardwicke, whether the circumstance, to which the parol evidence related, was previous or subsequent to the signing of the agreement; but it seems rather probable, from the nature of the case, that it was previous.

Proof of collateral facts to show intention.

Though an ambiguity, apparent on the face of a written instrument, cannot be explained by extrinsic evidence, yet where a question arises as to the general intention of the parties, concerning which the instrument is not decisive, it has been held, that proof of independent facts, collateral to the instrument, may be properly admitted. (*h*) Thus, in the case of King v.

(1) Greaves v. Ashlin, 3 Campb. 426. Williams v. Jones, 5 Barn. & Cress. 108. See Jefferey v. Walton, 1 Starkie, N. P. C. 267, where, in an action for not taking proper care of a horse, which the defendant had hired, the time of hiring and the price were proved by a written memorandum, and it was proved by parol evidence, that the defendant agreed to be liable for all accidents It does not appear from the report whether the written memorandum was signed by the defendant; if it was not signed, it cannot be considered as evidence of the agreement. See Ingram v. Lea, 2 Campb. 521.

(2) Parteriche v. Powlet, 2 Atk. 384. See Clinan v. Cooke, 1 Schoal. & Lef. 35.

(*f*) See Note 984, p. 1466. (*g*) See Note 985, p. 1477. (*h*) See Note 986, p. 1478.

Laindon,(1) on a question between two parishes respecting the settlement of a pauper, where it appeared that the pauper agreed to serve a person three years, to learn the business of a carpenter, and evidence was admitted at the sessions, that, at the time of making this agreement, the pauper agreed also to give a sum of money, as a premium to be taught the trade; that he paid the money, and that he was not to be employed, nor was he employed, in any other work than that of a carpenter; the Court of King's Bench held, that the evidence was properly admitted, as it was not offered to contradict the written agreement, but to ascertain an independent fact collateral to the written instrument, in order to explain the intention of the parties, the instrument being in some measure equivocal. It does not distinctly appear from the report, whether the fact alluded to was the verbal agreement, (by which the pauper agreed to pay a premium, and stipulated that he was to do only carpenter's work,) or only the payment of a certain sum of money by the pauper to the master at the time, when the agreement was made. But from the opinions expressed by the court, in which the evidence of the verbal agreement was not adverted to, it may be inferred, that the latter fact alone was adjudged to be admissible. Lord Kenyon said, "The evidence was offered to ascertain an independent fact, and I think it was properly received in evidence. That being so, the case appears to be shortly this: in consideration of three guineas paid by the pauper, the master undertook to teach him the business of a carpenter, and the pauper was to serve three years." Mr. Justice Lawrence expressed himself nearly in the same words; and Mr. Justice Le Blanc concurred in opinion with the Court, that the parol evidence was admissible, as evidence of a fact collateral to the written instrument.(2)

Parol agreement discharged by parol.

A deed cannot be discharged or revoked by parol; for every contract or agreement, says Lord Coke, ought to be dissolved by matter of as high a nature as the first deed; *nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine, quo ligatum est.* (3)(*i*) This reason is applied by Lord Coke

(1) 8 T. R. 379. And see 14 Ves. 170.
(2) See also 14 East, 544.
(3) 5 Rep. 26, a. 9 Rep. 79, b. 3 Lev. 234. Blake's case, 6 Rep. 44, a. Braddick v. Thompson, 8 East, 344.

(*i*) See Note 987, p. 1479.

only to agreements by specialty. But it appears to be generally understood, that executory agreements in writing, not under seal, may before breach be discharged and abandoned by a subsequent unwritten agreement, as well in cases where the original contract is required by the statute of frauds to be in writing, as where writing is unnecessary. Agreements, not by specialty, whether written or unwritten, are classed on the same level, and denominated agreements by parol; there is no such third class recognized by the law of England as contracts in writing not under seal; if they are merely written, and not specialties, they are called parol (or, more properly, simple) contracts.(1) It follows, therefore, that to admit evidence of an unwritten agreement, for the purpose of showing an abandonment or discharge of a previous written agreement, would not be to dissolve the agreement by matter of an inferior nature. Nor does the statute of frauds contain any provision respecting the dissolution of agreements; it prescribes the manner of revoking wills, and in many cases makes a written memorandum necessary in order to establish and enforce agreements; but, as to the discharge or abandonment of executory agreements, the statute is entirely silent, leaving the case as it stood at common law. The 17th section enacts, in certain cases, that "*a contract for the sale of goods* shall not be allowed to be good, unless some note or memorandum, in writing, of the bargain shall be made and signed," &c.; but an agreement to waive that contract, before breach, is not a contract for the sale of goods, and may therefore be binding, though not reduced into writing. So, the fourth section enacts, that "no action shall be brought *upon any contract or sale of lands*, &c., or any interest in or concerning them, unless the agreement, upon which the action shall be brought, or some memorandum or note thereof, shall be in writing," &c. This is very different from enacting, that all contracts or agreements *concerning* land shall be in writing; terms so general and comprehensive, that, if they had been introduced into the act, they might be considered as including an agreement for the waver of a purchase-contract, as well as the original agreement itself: the section only provides, "that *no action shall be brought upon any contract or sale of lands*," &c.; but it does not proceed

(1) Rann v. Hughes, 7 T. R. 350, n.

to enact, in case an action is brought, and the defence set up is a dissolution and abandonment of the agreement, that some note or written memorandum is also necessary to give effect and validity to such subsequent agreement. (*j*)

On a bill filed in a court of equity for the specific performance of a written agreement, it appears to be the better opinion, that the defendant may insist, that the agreement has been since discharged merely by parol between the parties. (1)(*k*) In the case of Buckhouse and Crosby, (2) indeed, where a bill was filed for the specific performance of a contract for the sale of an estate, and the defendant insisted that the contract had been discharged by parol, in support of which the case of Goman v. Salisbury was cited as an authority, Lord Hardwicke is reported to have declared, that "though he would not say, that a contract in writing could not be waved by parol, yet he should expect in such a case a very clear proof, and the proof in the case before him he thought very insufficient to discharge a contract in writing;" Lord Hardwicke then observed, that the statute of frauds requires, "that all contracts and agreements concerning land should be in writing, (3) and that an agreement to wave a purchase contract is as much an agreement concerning land as the original contract; however, there was not any occasion then to determine the point."* (*l*) And in the case of Bell v. How-

(1) Goman v. Salisbury, 1 Vern. 840, cited and approved by Sir J. Strange, in Legal v. Miller, 2 Ves. 299, and in Pitcairne v. Ogbourne, 2 Ves. 376, and cited by Lord Chancellor Redesdale in 1 Schoal. & Lef. 39. 2 Ves. 299, S. P. 1 Ves. jun. 404, S. P. 17 Ves. 356.

(2) Eq. Cas. Ab. 32.

(3) This is not quite correct. Vide supra, p. 564.

* In this case of Buckhouse and Crosby, the waver was not between the purchaser and vendor, but between a former and a subsequent purchaser. The material facts of the case will be found to be, that A., seized of lands in fee-simple, mortgaged them to the defendant, and afterwards authorized his attorney to sell the estate, who sold it by parol agreement to the plaintiff; A. being informed of this, wrote to the plaintiff, acquainting him that he accepted the purchase-money: afterwards A. by letter offered the estate for the same money to a third person, who agreed with A. for the purchase on behalf of the defendant, and accordingly A. by indenture conveyed the premises to the defendant in consideration of 300 guineas then paid. Before this conveyance, C., who treated for the purchase on behalf of the defendants, had notice of the plaintiff's title, but, being examined as witness for the defendant, swore that, before the conveyance was executed to him, the plaintiff agreed, that all prior contracts between him and A. should be void, and that it should be referred to A, whether the plaintiff or the defendant should be the purchaser, and that A., being written to, gave the preference to the defendant.

(*j*) See Note 988, p. 1481. (*k*) See Note 989, p. 1482. (*l*) See Note 990, p. 1482.

ard, (1) Lord Hardwicke, after noticing an objection on the part of the defendant, against decreeing an execution of written articles for the sale of an advowson, (namely, that the plaintiff had waved the articles,) is reported to have said, "It is certain, an interest in land cannot be parted with, or waved, by naked parol without writing; but added, "that articles may by parol be so far waved, that, if a party come into a court of equity to have specific execution of them, such parol waver will rebut the equity which the party before had, and prevent the Court from executing them specifically." But in the last case on this subject,(2) where the plaintiff prayed a specific performance of an agreement for a lease, under which the plaintiff had taken possession, as afterwards, as the defendant stated in his answer, the parties mutually abandoned the terms of the written agreement, and made another agreement by parol, the Master of the Rolls, observing upon the argument for the defendant, "that the agreement was waved, and that a written agreement may be so far waved by parol, that the Court will refuse the interposition of its equitable jurisdiction to enforce it," said, that as he conceived there was not in the case before him any waver within the meaning of the dicta or the decisions upon the subject, it was not necessary for him to give any precise opinion upon the point; "but," he added, "as at present advised, I incline to think, upon the doctrine of this Court, such would be the effect of a parol waver clearly and satisfactorily proved. The waver, spoken of in the cases, is an entire abandonment and dissolution of the contract, restoring the parties to their former situation. No such thing was for a moment in the contemplation of the parties. All that they at any time meant, was to add to, or modify, the terms of the original agreement." The bill was accordingly dismissed, but without costs.

Sect. III.

Of the Rule in Courts of Equity, respecting the Admissibility of Parol Evidence.

It would far exceed the proper limits of this treatise, to enquire into the rules observed by courts of equity, respecting the

(1) 9 Mod. 302.

(2) Price v. Dyer, 17 Ves. 356, 363. See also 9 Ves 250.

admissibility of parol evidence, on subjects within their peculiar jurisdiction. Such an enquiry would be long and laborious; and the multitude of cases, which it would be necessary to cite, would, after all, be seldom wanted in the business of courts of common law. The purpose of entering at all upon this subject, is with a view to mention some points very nearly connected with those in the last section.(*m*)

General rule.

The rules of evidence, in courts of equity, are, in general, the same as in courts of common law; although, in the application of those rules, diversities must necessarily arise from the different modes of proceeding in the two jurisdictions.(1) It is a general principle, therefore, established in the former courts, no less than in the latter, that parol evidence of the intention of the parties is not admissible to vary or add to the term of a written agreement.(2) (*n*) If the agreement is certain, explained in writing, and signed by the parties, that binds them: if it is not certain, and parol evidence is necessary to prove what the terms were, to admit such evidence would effectually break in upon the statute of frauds, and introduce all the mischiefs, inconvenience, and uncertainty, which the statute was designed to prevent.(3) In the case of Rich v. Jackson,(4) therefore, on a bill for specific performance, the Court of Chancery gave the same judgment, against the admissibility of parol evidence, to vary a written contract, as had been previously given by the Court of Common Pleas in an action between the same parties. "The question," said Lord Rosslyn in that case, "is, whether, in equity any more than at law, such evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement, by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement? I have looked into all the cases, and cannot find, that this Court has ever taken upon itself, in executing

(1) 2 Merivale, 464.
(2) Fell v. Chamberlain, 2 Dickins, 424. Hare v. Shearwood, 1 Ves. jun. 241. Jordan v. Sawkins, 3 Bro. Ch. C. 388. 1 Ves. jun. 402, S. C. Jackson v. Cator, 5 Ves. 688.
(3) Buller, J., Brodie v. St. Paul, 1 Ves. jun. 333.
(4) 6 Ves. 334, n.

(*m*) See Note 991, p. 1482. (*n*) See Note 992, p. 1483.

a written agreement by a specific performance, to add to it, by any circumstance that parol evidence could introduce."

There are certain exceptions to this general rule, the principle of which will be briefly considered in the present section. First, it will be enquired, in what cases a *defendant* may prove by parol evidence a variation in a written agreement, contrary to the intention of the party; secondly whether a *plaintiff* may produce such evidence. Some cases will then be mentioned, in which extrinsic evidence has been admitted, to rectify mistakes in deeds, and for the purpose of raising trusts in wills.

Rule with respect to the party *charged.*

1. When a court of equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party *charged* is admitted to show, that under the circumstance the plaintiff is not entitled to have the agreement specifically performed.(1) The admission of such evidence, as a matter of defence, is very frequent; it is used to rebut an equity. The defendant says, "The agreement, which you seek, is not the agreement which I meant to enter into;" and then he is let in to prove fraud or mistake:(2) (*o*) for the Court will not grant a decree for specific performance, unless it is satisfied, that, under all the circumstances, it is equitable to give more relief than the plaintiff is entitled to at law.(*p*)

The statute of frauds has not altered the situation of a defendant, against whom a specific performance is prayed; and he may give the same evidence now, which he might have given before.(3) The words of the statute are, that "no person shall be charged upon any contract, or sale of lands, &c. unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.' No person, then, can be charged with the execution of an agreement, who has not, either by himself or his agent, signed a written agreement: but the statute does not say, that if a written agreement is signed, the same exception to it may not be

(1) 7 Ves. 219.
(2) Lord Redesdale, 1 Schoal. & Lef. 39.
(3) 14 Ves. 524.

(*o*) See Note 993, p. 1483. (*p*) See Note 994, p. 1484.

taken as before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left by the statute as it was before; the statute does not say that a written agreement shall bind, but that an unwritten agreement shall not bind. (1) (*q*)

The general principle, to be deduced from the various authorities on this subject, appears to be, that a defendant, in answer to a bill for a specific performance, may suggest, and prove by parol evidence, that, by reason of fraud, surprise, or mistake, the written instrument does not correctly and truly express the agreement, but that there is an omission or insertion of a term, or some material variation, contrary to the intention and understanding of the parties. (2) (*r*)

The defendant may be admitted also to prove by parol evidence, that, after signing the written agreement, the parties made a verbal agreement varying the former; provided those variations have been so acted upon, that the original agreement can no longer be enforced without a fraud upon the defendant. Thus, in a case where there was a written agreement for the lease of a house at the annual rent of 32*l.*, and that the owner of the house should put it in repair; it was afterwards discovered, that the house was not worth repairing, and, without any alteration of the agreement, the house was in consequence pulled down with the consent of the tenant, who was apprised of the great expense, which the landlord must necessarily have incurred in making the repairs; the tenant then made a verbal agreement to add 8*l.* per annum to the 32*l.*, provided the house should be rebuilt; and, on a bill brought by the tenant for a specific performance of the lease, on the foot of the written agreement to pay 32*l.* rent, the defendant in his answer set up the parol agreement. (3)

(1) Lord Redesdale's judgment in the case of Clinan v. Cooke, 1 Schoal. & Lef. 39.

(2) Joynes v. Statham, 3 Atk. 388. Marquis of Townsend v. Stangroom, 6 Ves. 328. Woolam v. Hearne, 7 Ves. 211. Clarke v. Grant, 14 Ves. 524. Ramsbottom v. Gosden, 1 Ves. & Beam. 165. Winch v. Winchester, 1 Ves & Beam. 375.

(3) Legal v. Miller, 2 Ves. 299, cited 6 Ves. 366, n ; and 17 Ves. 364.

(*q*) See Note 995, p. 1484. (*r*) See Note 996, p. 1484.

Now here the original agreement was unexceptionable, but the execution of it under the new circumstances would have been a fraud upon the landlord; the landlord having rebuilt instead of repairing the house, and the tenant having agreed to pay an additional rent in consideration of the additional expense. The situation of the parties was therefore materially altered. But variations, verbally agreed upon, are not sufficient to prevent the execution of a written agreement, where the situation of the parties in all other respects remains unaltered. (1)

Rule with respect to the *plaintiff* in equity.

2. Whether a *plaintiff* in equity, on a bill for the specific performance of a written agreement, can in any case be admitted to prove, that some terms of the agreement have been omitted or varied by *fraud*, *mistake*, or *surprise*, and that the agreement is different from what the parties intended; and whether, on such a case being distinctly proved, the plaintiff can obtain a decree for a specific performance of the agreement in its rectified form, is a much larger and more difficult question, and one on which it is not easy to reconcile all the authorities. In the cases of Lord Irnham v. Child, (2) and Lord Portmore v. Morris, (3) where the plaintiff filed a bill to redeem an annuity, and question was, whether parol evidence could be admitted to show, that the parties intended the annuity to be redeemable, but did not insert in the deed a clause to that effect, supposing that it would make the transaction usurious ;* Lord Thurlow in the one case, and Lord Kenyon in the other, thought it clear, that if the clause had been omitted by *fraud*, or if the agreement had been varied by *fraud*, the evidence would be admissible. Lord Thurlow, in the former case, after saying, that the rule of

(1) 17 Ves. 364; and see Omerod v. Hardman, 5 Ves. 722.

(2) 1 Bro, Ch C. 91.

(3) 2 Bro. Ch. C. 219.

* Lord Eldon has observed on these cases, (*a*) that they proceed on an indisputably clear principle. that the parties did not mean to insert in the agreement a provision for redemption, because they agreed that it would be usurious; and they desired the Court to do, not what they intended, for the insertion of that provision was directly contrary to that intention; but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention. The answer is, they admit it was not to be in the deed; and why was the Court to insert it, where two risks had occurred to the parties, the danger of usury, and the danger of trusting to the honor of the party?

(*a*) 6 Ves. 332.

evidence is not subverted, if there is clear proof of *fraud*, added, "Then as to *mistake or accident*, suppose it were a clear thing, that one agreement was intended, and that by accident it was extended further; but there is no such case in the book: if *admitted* to be a mistake, the Court would not overturn the rule of equity by varying the deed, but it would be an equity *dehors* the deed. Then it should be proved as much to the satisfaction of the Court, as if it were admitted." In another part of his judgment, Lord Thurlow says, "it is necessary to see the statement of the bill; if it states, that it was agreed, that the clause for redemption should not be inserted, they cannot read the evidence; but if it is stated, that it was intended to insert the clause, but that it was suppressed by *fraud*, I cannot refuse to hear evidence read to establish the rule of equity. They are at liberty to read evidence to prove such *fraud* as will make a ground in equity."

This doctrine respecting the propriety of receiving parol evidence, on the part of the *plaintiff*, under circumstances of clear *fraud*, appears to have been admitted in other modern cases.(1) The difficulty has generally been in carrying the principle into practice, and in ascertaining what constitutes a fraud. In the case of Pember v. Mathers,(2) Lord Thurlow allowed the plaintiff, on a bill for specific performance, to give parol evidence of a promise by the defendant under the following circumstances. The bill was filed by the original lessees of a leasehold estate against an assignee of the lease, on his parol undertaking to indemnify the plaintiff against all rents and covenants, to be paid or kept on the part of the lessee, and to execute a bond for such an indemnity. The assignment had been made by a sale by auction; and the conditions of sale did not stipulate the indemnity; but it rested only on parol evidence. This evidence was objected to as inadmissible, on the ground, that, where the parties have entered into a written agreement, no parol evidence could be admitted to increase or diminish such agreement. Lord Thurlow said, "The rule is right; but where the objection (to the omission of an article) was

(1) See Marquis of Townsend v. Stangroom, 6 Ves. 338.

(2) 1 Bro. Ch. C. 51.

formally made, and promised by the other party to be rectified, it comes among the string of cases, where it is considered as a fraud upon the rule of law." As some doubt arose, whether the evidence was sufficient to establish the parol undertaking to indemnify, entered into by the defendants, Lord Thurlow directed an issue to be tried, whether such promise was made on the day of the execution of the assignment; and, this being found in the affirmative, the plaintiff had a decree for a specific performance. In speaking, however, of the case of Pember v. Mathers, the late Master of the Rolls appears to have entertained some doubt, how far it would be proper to go the length of the doctrine there laid down, or to decree a specific performance on the ground of such a promise.(1)(*s*)

It does not appear from any reported case, that the *plaintiff* has been allowed to give parol evidence, varying a written agreement, on the ground of *mistake* or *surprise*. In the case of Joynes v. Statham,(2) indeed, where, on a bill for the specific performance of an agreement for the lease of a house at a certain rent, the *defendant* was admitted to prove by parol evidence, that the agreement was for rent clear of all taxes, Lord Chancellor Hardwicke, after observing that "the *defendant* had a right to insist, *either on account of an omission, mistake, or fraud*, that the plaintiff should not have a specific performance," is reported to have added—"Suppose the defendant had been the plaintiff, and had brought a bill for the specific performance of the agreement, I do not see but that he might have been allowed the benefit of disclosing this to the Court, because it was an agreement executory only, and, as in leases there are always covenants relating to taxes, the Master will enquire, what the agreement was as to taxes; and therefore the proof, offered here, is not a variation of the agreement, but is explanatory only of what those taxes were." Lord Redesdale, in a very late case,(3) commenting on this passage, observed, "That the words do not appear to import any thing positive;" and with respect to the case, which Lord Hardwicke conceived might possibly be made, where even a *plaintiff* might be admitted to show an omission

(1) See 14 Ves. 524.
(2) 3 Atk. 388.
(3) Clinan v. Cooke, 1 Schoal. & Lef 39. See also 4 Bro Ch. C. 518. 6 Ves. 335, n.; and 7 Ves 220.

(*s*) See Note, 997, p. 1484.

in a written instrument as well on the ground of *mistake* as of *fraud*,* added, that he could find no decision except the contrary way.

In the case of the Marquis of Townsend v. Stangroom,(1) Lord Eldon, after observing, "that it was competent to a court of equity (for the purpose of enabling it to determine whether it will specifically execute an agreement) to receive evidence of the circumstances under which it was obtained," added, "and I will not say, that there are no cases, in which it may be received to enable the Court to *rectify a written agreement upon surprise or mistake, as well as fraud:* proper irrefragable evidence, as clearly satisfactory, that there has been mistake or surprise, as, in the other case, that there has been fraud. I agree that those producing evidence of mistake or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty; but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence." A specific performance was in this case sought, with a variation intended to be introduced by parol. And Lord Eldon stated, "he would not say, that, upon the evidence without the answer, he should not have had so much doubt whether he ought not rectify the agreement, as to take more time to consider whether the bill should be dismissed; but the evidence must be taken, due regard being had to the answer;(2) and the Court is not to decide upon the allegation as to the probability against the answer." The bill was accordingly dismissed, but without costs.

The later case of Woollam v. Heam(3) determined by Sir W. Grant, Master of the Rolls, on great consideration, sets the doctrine of the courts of equity on this subject in a very distinct and clear point of view. The plaintiff there filed a bill for the

(1) 6 Ves. 338.
(2) And see 1 Bro. Ch. C. 92. 3 Bro. Ch. C. 168. 1 Ves. jun. 241.
(3) 7 Ves. 211.

* The words of Lord Redesdale, in the report, are as follows:—"There seems to have been something of a floating idea in the mind of Lord Hardwicke, that by possibility a case might be made, in which even a plaintiff might be admitted to show an omission *either by mistake or fraud.* However I can find no decision except the contrary way."

specific performance of an agreement for a lease; the bill stated that the rent of 73*l.* 10*s.*, specified in the agreement, was inserted by mistake, or with some unfair view; the real agreement being, that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor, and that he the defendant did not pay more than 60*l.* The defendant in his answer admitted, he might have said, that the plaintiff should have the lease upon the same terms, not meaning the same rent, but upon terms on the whole equally advantageous; insisting, that as he had laid out a great deal of money, the plaintiff would upon the whole have as good a bargain. The plaintiff offered parol evidence to prove, that he was to have it on the same terms as the defendant had it, and to show that nothing could be meant by the expression but the same rent; nothing being in discussion between them but the amount of rent. The question was, whether this evidence was admissible. The Master of the Rolls, in giving judgment, said, that "by the rule of law, independent of the statute of frauds, parol evidence could not be received to contradict a written agreement. To admit it for the purpose of proving, that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence, than any that parol can supply. If this had been a bill brought by the *defendant*, for a specific performance," added the Master of the Rolls, "I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree; first, to falsify the written agreement, and then to substitute in its place a parol agreement, to be executed by the Court. Thinking as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence, than I am forced by precedent. There is no case, in which the Court has gone the length now desired. But two cases(1) are produced, in which, it is said, there is an intimation from Lord Hardwicke to that effect. Upon this, it

(1) Walker v. Walker, 2 Atk. 98. Joynes v. Statham, 3 Atk. 388.

might be sufficient to say, it was not decided. But it is evident from the manner, in which that great Judge qualifies his own doubts, that he thought it impossible to maintain such a proposition as the plaintiff is driven to maintain. In Walker v. Walker, it is to be observed, first, that the parol evidence was not offered for the purpose of contradicting any thing in the written agreement. It was admitted, that, as far as it went, it stated the true meaning; but it was contended by the defendant, that there was another collateral agreement, which the plaintiff ought to execute, before he could have the benefit of the written agreement; it was evidence too, offered in defence, to resist a decree. The evidence offered in this case," added the Master of the Rolls, concluding his judgment, "is to vary an agreement in a material part; and having varied it, to procure it to be executed in another form. There is nothing to show that this ought to be done." The proposed evidence was accordingly rejected; and the bill was dismissed, without costs. (*t*)

Rule, in case of part-performance.

Where a written agreement has been varied by parol, and there has been such a part-performance of the parol variation, as would have procured it to be specifically executed, provided it had formed a part of the original agreement, the plaintiff, in that case, will be admitted to give evidence of such subsequent unwritten variation. As to what constitutes a part-performance, Lord Redesdale, in a late case, (1) has laid down the following rule,—that "nothing is to be considered as a part-performance, which does not put the party into a situation that is a fraud upon him, unless the agreement is performed: for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement. This is put strongly in the case of Foxcraft v. Lister; (2) there the party was let into possession on a parol agreement, and it was said, that he ought not to be liable as a wrong-doer, and to account for the rents and profits, because he entered in pursuance of the agreement. Then for the purpose of defending himself against a charge, which might otherwise be made against him, such evidence was admissible; and if it was admissible for such purpose, there is no reason why it should not

(1) Clinan v. Cooke, 1 Schoal. & Lef. 41. 14 Ves. 388.

(2) 2 Vern. 456.

(*t*) See Note 998, p. 1485.

be admissible throughout. That," continued Lord Redesdale, "I apprehend to be the ground, on which courts of equity have proceeded, in permitting part-performance of an agreement to be a ground for avoiding the statute; and I take it, therefore, that nothing is to be considered as part-performance which is not of that nature. Payment of money is not part-performance, for it may be repaid; and then the parties will be just as they were before, especially if repaid with interest. But the great reason, why part-payment does not take such an agreement out of the statute, is, that the statute has said, in another case, namely, with respect to goods, that it shall operate as a part-performance; and the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant it should not bind in the case of lands."(*u*)

Mistakes in deeds corrected.

3. Mistakes and misapprehensions, in the drawers of deeds or of written agreements, are a subject for relief in courts of equity, and may be rectified according to the true intention of the parties.(1) (*v*) Thus, on a bill to rectify a mistake in a policy of insurance, which the plaintiff suggested to have been made too general, and contrary to the intention of the parties, Lord Hardwicke said, (2) there could be no doubt, but that the Court of Chancery had jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well against fraud in contracts; so that if reduced into writing, contrary to the intention of the parties *on proper proof* that would be rectified. "This," as Lord Eldon has observed,(3) "is loose in one sense, as it leaves to every Judge to say, whether the proof is that proper proof, which ought to satisfy him." The principal evidence on the part of the plaintiff, in this case, was the deposition of a witness, who had transacted the business for the company the (defendants;) but this evidence appeared to the Court not sufficiently certain to be relied upon. Lord Hardwicke observed, that the proof in such a case ought to be the strongest possible; and as it did not sufficiently appear to the Court, that the policy had

(1) 2 Atk. 203. Stangroom v Marquis of Townsend, 6 Ves. 328. Beaumont v. Bramley, 1 Turn. Ch. R. 41.

(2) Henkle v. Roy. Ex. Assur. Camp. 1 Ves. 318, cited 6 Ves. 333. See also Motteux v. Lond. Assur. Comp. 1 Atk. 545. Thomas v. Fraser, 3 Ves. 399. 10 Ves. 227.

(3) 6 Ves. 333.

(*u*) See Note 999, p. 1486. (*v*) See Note 1000, p. 1486.

been framed contrary to the intention and real agreement of the parties, the bill was dismissed. In the case of Baker v. Paine, on a bill filed for an account under a written agreement, the minutes and calculations, which had been previously made by the parties, were admitted in evidence, in order to prove a mistake made in the agreement by the person employed to draw it. (1) And in a variety of cases, where settlements have been drawn by mistake, contrary to the instruction of the parties, the mistake has been rectified by courts of equity, and the settlement made conformably to the instructions. (2) The Court, however, will expect full and satisfactory evidence of the mistake and misapprehension of the party's intention, before it will alter a settlement. In one case, where the parol evidence of the attorney, who had received verbal instructions, was offered, the Court held, that as nothing appeared in writing under the hands of the parties to show their intention, the settlement could not be altered; (3) and in another case, Sir Thomas Clarke is reported to have said, that he did not give a positive opinion as to the head of mistake, but he did not think the Court had relied on parol evidence only. (4) (*w*)

Trusts raised in equity.

4. Provisions in wills have in certain cases been enlarged by parol evidence, and trusts in equity raised, as against executors or other persons claiming an interest under wills, where it has appeared, that the testator intended to make a further provision in his will, but omitted to insert it on receiving a promise, that notwithstanding such omission, his intention should be carried into effect. (*x*) Thus, in the case of Oldham v. Lichford, (5) a witness was allowed to prove that the defendant, who was the testator's executor and devisee of his real estate, had promised the testator, that he would pay the annuity bequeathed to the plaintiff, and that otherwise the testator would have charged the real estate with the payment. And on this evidence, it was decreed at the Rolls, that the real estate should be charged with the annuity; and this decree was afterwards affirmed, on appeal

(1) Baker v. Paine, 1 Ves. 457, cited in Rich v. Jackson, 6 Ves. 336, n.

(2) Randal v. Randal, 2 P. Wms. 469. Jenkins v. Quinchant, 5 Ves. 596, n Barstow v. Kilvington, 5 Ves. 59. Butt v. Barlow, 3 Bro. Ch. C. 451.

(3) Harwood v. Wallis, cited 2 Ves. 195.

(4) 1 Dickens, 295. And see Shergold v. Boone, 13 Ves. 373, 376.

(5) 2 Vern 506.

(*w*) See Note 1001, p. 1487. (*x*) See Note 1002, p. 1487.

to the Court of Chancery. In a later case, (1) where a bill was filed against an executor and residuary legatee, to have a bequest enlaged, it appeared from a paper written by the defendant himself, that the testator, a few days before his death, had mentioned to him what he had bequeathed to the plaintiff, and that it was his wish, that he should have a larger sum; it was further proved, that after the testator's death, when the paper was shown to the defendant, he promised to perform the same according to the testator's request; another witness proved, that the testator mentioned to him, in the presence of the defendant, the annuity, which he had bequeated to the plaintiff, and that it was his desire he should have a larger annuity, mentioning the sum ; that the testator then requested the defendant to see such annuity paid to the plaintiff, and the defendant promised it should be done, as if it had been expressed in the will; and, lastly, that the witness and the defendant desired the testator to send for some person to draw a new will, which the testator refused to do, saying, he would leave it to the defendant's generosity. "Upon this evidence," said the Master of the Rolls, "the question is, whether by reposing that trust in the defendant, the testator was not prevented from making a new will. The defendant ought to have told him, that if he did not put it in his will, he would not do it. Instead of that, he promised to do it; upon which the testator refused to make a new will. I am quite relieved," added the Master of the Rolls, "from any difficulty as to the statute of frauds. The question is, whether the confidence, that the defendant would perform the trust which he undertook, did not prevent the testator from making a new will." The Court accordingly ordered the defendant to pay the increased sum out of the assets, with costs; and, if the assets were not sufficient for the costs, that he should pay them personally. (*y*)

(1) Barrow v. Greenough, 3 Ves. 152.

(*y*) See Note 1003, p. 1487.

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